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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

EGON and SONYA LOEBNER,

PETITIONERS,

v.

FRANCHISE TAX BOARD OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FIRST APPELLATE
DISTRICT, DIVISION FOUR,
CASE A030189 (SF 25067,
CALIFORNIA SUPREME COURT)

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QUESTIONS PRESENTED

This case involves the constitutionalities of four state "statutes" in relation to various clauses of the Fourteenth Amendment.

The first question is whether the first "statute," section 32, article XIII of the California Constitution (a prohibition to interfere with the collection of any tax by any legal means), as applied by the courts below to the second and third California statutes, Code of Civil Procedure section 1060.5 and Revenue and Taxation Code section 19081 (authorizing declaratory relief to determine the petitioners' California "residency" for Personal Income Tax purposes without first paying a tax based solely on alleged "residency"), is consistent with the Due Process clause of the Fourteenth Amendment, as to which

question two California courts of appeal are in conflict.

The second question is whether the California Legislature violated the petitioners' federal right under the Equal Protection Clause when, by promulgating a fourth statute, Section 17014(b) of the Revenue and Taxation Code (a definition of "resident" which, among others, reclassifies to "residents" "non-residents" appointed to their federal office in the Executive Branch by the President of the United States with the advice and consent of the Senate), it established a discriminatory class distinction unrelated to the "minimal state contacts" doctrine.

The third question is whether the California Legislature violated the petitioners' federal right under the Privileges and Immunities Clause when, promulgating the fourth statute (see

Section 17014(b), supra), it abridged their Diplomatic Service Privileges and Immunities, which were granted to them by the President of the United States with the advice and consent of the Senate.

PARTIES

The petitioners are a former Foreign Service Reserve Officer of the United States of America and spouse whc were posted from 1974 to 1976 to the Moscow Embassy. On March 15, 1975, petitioner, Egon Loebner, received the Presidential appointment and U.S. Senate confirmation as Consular Officer and Secretary in the Diplomatic Service of the United States [Appendix M].

The respondent is a legislatively established Administrative Agency of California, empowered to assess and collect taxes under the Personal Income Tax Law of the State, which on May 2, 1980 determined and on February 6, 1981 affirmed that by virtue of the above-mentioned appointment the petitioners were residents of California under a new subsection of a state statute which went into effect in 1974 and which applies

solely to a minute class of Federal Officials and employees.

The attorneys for respondents are John K. Van De Kamp, Attorney General of the State of California, and Patricia Streloff, Deputy Attorney General of the State of California, at 6000 State Building, 350 McAllister Street, San Francisco 94102; telephone (415) 557-2204.

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FRANCHISE TAX BOARD OF CALIFORNIA,

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT, DIVISION FOUR

The petitioners Egon and Sonya Loebner respectfully request that a Writ of Certiorari be issued to review the judgment and opinion of the California Court of Appeal for the First Appellate District, Division Four, which became final on March 31, 1988.

OPINIONS BELOW

The June 23, 1986 Opinion of the Court of Appeal below [Appendix A] appeared at 183 Cal.App.3d 497, 288 Cal.Rptr. 262 (1986) and appears currently "reprinted without change to permit tracking pending dispositions on review by the California Supreme Court at 193 Cal.App.3d 64 (1987)." It was depublished by order of the California Supreme Court on March 31, 1988 [Appendix E].

The May 2, 1985 conflicting opinion of a California Second Appellate District Court of Appeal in Corbett v. Franchise Tax Board [Appendix J] appeared at 167 Cal.App.3d 808. It was denied review and depublished by order of the California Supreme Court on August 22, 1985 [Appendix I]. Requests for partial publication were twice denied [Appendices K and L].

JURISDICTION

Judgment of the Court of Appeal was entered June 23, 1986. A timely Petition for Review was filed on August 4, 1986 in the California Supreme Court, which granted Petition for Review on September 30, 1986 [Appendix D]. On March 31, 1988, the California Supreme Court dismissed the Review and remanded the cause to the Court of Appeal with instruction not to publish the opinion [Appendix E]. On March 31, 1988, the Court of Appeal issued a remittitur certifying that the June 23, 1986 judgment became final [Appendix C]. On June 20, 1988, Associate Justice of the Supreme Court of the United States, Sandra D. O'Connor, ordered that time for filing a Petition for Writ of Certiorari in this cause be extended to and including July 29, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3)

because two state statutes have been held unconstitutional when it was drawn in question that the Due Process Clause requires that they be constitutional.[1]

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

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1. It is the petitioners' belief that jurisdiction of this Court is also invoked under 28 U.S.C. Section 1257(2) since the courts below upheld a state "statute," section 32 of article XIII of the California Constitution, when it was drawn in question as being repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Section 1 of article III of the California Constitution provides in pertinent part:

> "The State of California is an inseparable part of the United States of America, and the United State Constitution is the supreme law of the land."

Section 3.5 of article III of the California Constitution provides in pertinent part:

> "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power to declare a statute unconstitutional."

Section 14, article VI of the California Constitution provides in pertinent part:

> "The Legislature shall for the prompt publication of such opinions of the Supreme court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person."

> "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

Section 32, article XIII of the California Constitution provides:

> "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

Section 1060.5 of the California Code of Civil Procedure provides:

> "Any individual claiming to be a nonresident of the State of California for the purposes of the Personal Income Tax Law may commence an action in the Superior Court in the County of Sacramento, or in the County of Los Angeles, or in the City and County of San Francisco, against the Franchise Tax Board to determine the fact of his residence in this State under the conditions and circumstances set forth in Section 19081 of the Revenue and Taxation Code."

Section 17014 of the Revenue and Taxation Code provides:

> "(a) 'Resident' includes:
> (1) Every individual who is in this state for other than a temporary or transitory purpose.
> (2) Every individual domiciled in

this state who is outside the state for a temporary or transitory purpose.

(b) Any individual (and spouse) who is domiciled in this state shall be considered outside this state for a temporary or transitory purpose while such individual:

(1) Holds an elective office of the government of the United States, or

(2) Is employed on the staff of an elective officer in the legislative branch of the government of the United States as described in paragraph (1), or

(3) Holds an appointive office in the executive branch of the government of the United States (other than the armed forces of the United States or career appointees in the United States Foreign Service) if the appointment to such office was by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States.

(c) Any individual who is a resident of this state continues to be a resident even though temporarily absent from the state."

Section 17015 of the Revenue and Taxation Code provides:

"'Nonresident' means every individual other than a resident."

Section 19081 of the Revenue and Taxation Code provides:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state or against any officer of this state to prevent or enjoin the assessment or collection of any tax under this part; provided, however, that any individual after protesting a notice or notices of deficiency assessment issued because of his alleged residence in this state and after appealing from the action of the Franchise Tax Board to the State Board of Equalization, may within 60 days after the action of the State Board of Equalization becomes final commence an action, on the grounds set forth in his protest, in the Superior Court of the County of Sacramento, in the County of Los Angeles, or in the City and County of San Francisco against the Franchise Tax Board to determine the fact of his residence in this state during the year or years set forth in the notice or notices of deficiency assessment. No tax under this part based solely upon the residence of such an individual shall be collected from such individual until 60 days after the action of the State Board of Equalization becomes final and, if he commences an action pursuant to this section, during the pendency of such action, other than by way of or under the jeopardy assessment provisions of this part."

Section 19082 of the Revenue and Taxation Code provides:

"Except as provided in Section 19085, after payment of the tax and denial by the Franchise Tax Board of a claim for refund, any taxpayer claiming that the tax computed and assessed against him under this part is void in whole or in part may bring an action, upon the grounds set forth in his claim for refund, against the Franchise Tax Board for the recovery of the whole or any part of the amount paid."

The 1973 Edition[2] of subdivision (s) of § 47.155/c of the District of Columbia Code provides:[3]

"The word 'resident' means every individual domiciled within the District on the last day of the taxable year, and every other individual who maintains a place of abode within the District for more than seven months of the taxable year, whether domiciled in the District or not. The word 'resident' shall not include any elective officer of the Government of the United States or any employee

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2. In the 1981 Edition this provision was renumbered to the current paragraph (17) of section 47-1801.4.

3. In 1982 this provision was amended to exclude from the word "resident" also "any Justice of the Supreme Court of the United States" unless such "Justices are domiciled within the District at any time during the taxable year." (1986 Suppl.)

on the staff of an elected officer in the legislative branch of the Government of the United States if such employee is a bona fide resident of the State of residence of such elected officer, or any officer of the executive branch of such Government whose appointment to the office held by him was by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States, unless such officers are domiciled within the District on the last day of the taxable year."

Rule 29.4 of the California Rules of Court provides, in pertinent part:

"(c) [Dismissal of review] The Supreme Court may dismiss review of a cause as improvidently granted and remand the cause to the Court of Appeal. The order of dismissal and remand shall be sent by the clerk to all parties and to the Court of Appeal. On filing of the order in the Court of Appeal, the decision of the Court of Appeal shall become final and the clerk of the Court of Appeal shall issue a remittitur forthwith."

Rule 976 of the California Rules of Court provides in pertinent part:

"(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports.

"(b) [Standards for publication of

opinions of other courts] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

"(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

"(2) resolves or creates an apparent conflict in the law;

"(3) involves a legal issue of continuing public interest; or

"(4) makes a significant contribution to legal literature by reviewing the either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

"(c) [Publication procedure]

"(1) [Courts of Appeal and appellate departments] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

"(2) [Supreme Court] An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect.

"(d) [Superseded opinions] Unless otherwise ordered by the Supreme Court, no opinion superseded by a

grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part."

Rule 976.1 of the California Rules of Court provides in pertinent part:

"(a) [Partial publication authorized] A majority of the court rendering an opinion may certify for publication any part of the opinion that meets the standard for publication specified under subdivision (b) of rule 976. The published part shall indicate that part of the opinion is unpublished. All material, factual and legal, that aids in the application or interpretation of the published part shall be in the published part.

"(b) [Other rules applicable] For purposes of rules 976, 977, and 978, the published part of the opinion shall be treated as a published opinion, and the unpublished part as an unpublished opinion."

Rule 977 of the California Rules of Court provides in pertinent part:

"(a) [Unpublished opinions] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action

or proceeding except as provided in subdivision (b).

"(b) [Exceptions] Such an opinion may be cited or relied on:

"(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel;"

Rule 978 of the California Rules of Court provides:

"(a) [Request procedure; action by a court rendering opinion] A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by letter, with a copy to each party to the action or proceeding not joining therein, stating concisely why the opinion meets one or more of the publication standards. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication.

"(b) [Action by Supreme Court] When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The

court shall send notice of its action to the transmitting court, each party,and any person who has requested publication.

"(c) [Effect of Supreme Court order for publication] An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion."

JUDGMENT SOUGHT TO BE REVIEWED

The judgment sought to be reviewed is the affirmation of the Court of Appeal of the State of California for the First Appellate District, Division Four [Appendices A, B, and C] of the trial court's judgment of dismissal [Appendix F] which followed the trial court's sustaining of the respondent's demurrer to the petitioners' Complaint for Determination of California Residency [Appendix G] on the grounds that (1) the trialcourt "has no jurisdiction over the subject of the action" and (2) the

Complaint failed to state facts sufficient to constitute cause of action against the respondent.

STATEMENT OF THE CASE

Petitioners were residents of California until December of 1974, at which time they left in order that Mr. Loebner could assume his position as a Foreign Service Reserve Officer of the United States of America at the American Embassy in Moscow, U.S.S.R. "His appointment was for a period of five years, or the needs of the service, whichever period would be less. It was understood that Mr. Loebner would be posted to Moscow for a two- or three-year tour, where he would serve as Chief of the Science Section at the American Embassy. After that, he was to be transferred to other duties,if need be." (Court Record Transcript [CT] at 02.)

"[The petitioners] liquidated their household in Palo Alto and left with all of their minor children for a prolonged and indefinite stay in Moscow, U.S.S.R., which was to be followed by a residence to be yet determined by the State Department, if it had need of Mr. Loebner's services elsewhere. The [petitioners] engaged a real estate agent to look after their residence. They shipped their household effects to Moscow and stored the remainder in a State Department designated location. Mr. Loebner severed his professional connections in California." (CT 02.)

"The [petitioners] established accounts at the American Embassy Community Association and department stores in Finland and Denmark. They changed their mailing address and checking address to Washington, D.C., and transferred their department store and

insurance accounts to the East Coast. The [petitioners] obtained Soviet driver's licenses and diplomatic ID cards. They transferred all their medical and dental records to the State Department. Most of their social contacts were with the American Community in Moscow and the Diplomatic Corps. During the calendar year 1975, the [petitioners] did not vote in California. Neither did they file a resident personal income tax return for that year in the State of California." (CT 03.)

". . . Mr. Loebner informed his superiors in Washington on September 5, 1975 of his intention not to remain for a third year in Moscow." (CT 03.) He subsequently tried to secure several positions outside of California, but "(b)ecause of a confluence of circumstances no suitable openings were

available at that time." (CT 04.) On November 1, 1976, he separated from the Foreign Service Reserve and returned to Palo Alto.

On May 6, 1980, petitioners protested (CT 15) the May 2, 1980 Notice of Deficiency Assessment (CT 13-14) issued by the Franchise Tax Board, claiming that they were not residents under the California Personal Income Tax Law as alleged by the Board. On February 6, 1981, the Board affirmed its residence determination stating: "The taxpayer is held to be a 'resident' for the taxable year [1976] pursuant to section 17014(b) of the Revenue and Taxation Code." [Appendix H].[4]

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4. The Board's determination of petitioners' alleged residence under subdivision (b) of Section 17014 has presumably been occasioned by the petitioners' submission to the Board of a xerographic copy of the document through which President Ford appointed Mr. Loebner a Consular Officer and a Secretary in the Diplomatic Service of the United

Petitioners filed a Notice of Appeal with the California State Board of Equalization on March 6, 1981. After numerous postponements (all requested by the Franchise Tax Board), a hearing was held in May 1983 before the California State Board of Equalization. Presumably because of its counsel's illness, it was only on May 8, 1984 that the State Board of Equalization acted, rejecting the petitioner's appeal from the determination of the Franchise Tax Board.

On July 6, 1984, petitioners filed a Complaint for Determination of Residency against the Franchise Tax Board of California, invoking jurisdiction of the Superior Court of the State of California, in and for the City and

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States of America and authorized and empowered him "to receive and enjoy all the rights, privileges and immunities appertaining" to that appointment. [Appendix M].

County of San Francisco, pursuant to statutory provisions under the Revenue and Taxation Code of California (Section 19081) and the Code of Civil Prccedure of California.

The respondent Franchise Tax Board demurred to the petitioners' complaint on August 27, 1984. The two grounds of the demurrer were that the trial court lacks jurisdiction over the subject of the action and that the petitioners' complaint fails to state facts sufficient to constitute action against the respondent (CT 27-34). The respondent's argument asserted that the two state statutes sections 1060.5 and 19081 were in conflict with section 32 of article XIII of the California Constitution (CT 30-32). The demurrer stated that "the cited statutes purport to allow what the Constitution absolutely forbids: declaratory relief against state tax

assessments" (CT 31; emphasis added). The demurrer relied heavily on Pacific Gas and Electric v. State Bd. of Equal., 27 Cal.3d 277, 165 Cal.Rptr. 122; 611 P.2d 463 (1980) stating that "it has consistently been held that a suit to recover alleged overpayment is the exclusive means of obtaining judicial review of tax proceedings" (CT 30).[5,6,7,8]

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5. By exclusive means demurrer presumably refers to Section 19082 of the California Revenue and Taxation Code.

6. The opinion of the court of appeal below [see Appendix A] also quotes profusely from Pacific Gas & Electric (see 193 Cal.App.3d at 69-70). Just as the demurrer, it underscores (what petitioners consider a mere dictum) the California Supreme Court's remark that section 32 is an "unequivocal constitutional prohibition against prepayment tax litigation."

7. In December 1987, the California Supreme Court significantly modified its above quoted 1980 opinion on dealing with section 32. In Western Oil & Gas Assn. v. State Board of Equalization 44 Cal.3d 208, 213 (1987), referring to the Board's contentions that the relief granted by the trial court is barred by California Constitution, article XIII, section 32, it stated: "We agree

The petitioners opposed the demurrer on several grounds. They stated that section 32 and the two statutes can and should be harmonized, that the Franchise Tax Board was barred by section 3.5 of article III of the California Constitution to declare the two statutes

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that the constitutional provision precludes the prepayment relief sought by the companies in this case, but we reject the Board's contention that the provision bars all prepayment challenges to the Board's authority." (Emphasis in the original.) The importance of this modification was further stressed by the California Supreme Court when on March 31, 1988 it transferred Union Pacific R.R. Co. v. State Bd. of Equalization 192 Cal.App.3d 487 (1-A030006, A031647, A032316, Div 5), after having granted review on August 26, 1987, to Ct.App., 1st Dist 5, with directions to reconsider in light of Western Oil & Gas Assn. v. State Bd. of Equalization, supra. The new opinion, Union Pacific R.R. Co. v. State Bd. of Equalization, 201 Cal.App.3d 647, 655-6 (1988) states in pertinent part "We must determine if section 32 provides an absolute prohibition to judicial interference in the assessment and collection of the tax or if there exists circumstances which permit limited judicial intervention. This question was answered in the recent case of Western Oil & Gas Assn. v. State Board of Equalization, supra, 44 Cal.3d 208. The court indicated that . . . section 32 applies. Nonetheless, limited judicial intervention is permitted

unconstitutional, and that the California Legislature drafted the two statutes to avoid conflict with the United States Constitution.

Unbeknown to the petitioners and the trial court, despite its questioning of

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when the request for information violates provisions of the federal Constitution prohibiting unreasonable searches and services, violations of the right to privacy of the privilege against self-incrimination. (See id., at pp. 213-214.) 'The court's inquiry must necessarily be limited, however, to avoid undue interference with the collection of taxes. . . .'"

8. The enactment of the comparable Tax Injunction Act, 28 U.S.C. § 1341, forbidding the federal courts to entertain suits to enjoin collection of state taxes "where a plain, speedy, and efficient remedy may be had at law or equity in the courts of such State" throws additional light on the proper construction to be given Section 32 of article XIII of the California Constitution. It indicates that Congress intended to make available the injunctive remedy against collection of state taxes under special circumstances where the remedy is neither plain, nor speedy nor efficient. In the case at hand, the remedy has to be judged not plain since conflict between two California courts of last resort has made declaratory relief for residency determination prior to the collection of the disputed state tax uncertain. (See Hillsborough v. Cromwell, 326 U.S. 620 (1946) uncertainty concerning the meaning of the local law.)

the respondent during the September 28, 1984 hearing on demurrer [Appendix N], was the fact that early in August 1984 the respondent had appealed a judgment of a trial court in the County of Los Angeles which held that the two state statutes (Sections 1060.5 and 19081), which the respondent purported to be in conflict with section 32, were constitutional under both the California and United States Constitutions. (For the May 2, 1985 opinion of the Court of Appeal, Second District, Division Three, on Corbett v. Franchise Tax Board, 167 Cal.App.3d 808 (1985), see Appendix J. As indicated by Appendix I, it became depublished on August 22, 1985 in reliance on Section 14, article VI of the California Constitution and rule 976 of the California Rules of Court. Having sustained the demurrer [Appendix G], the trial court below issued a judgment of

dismissal on November 27, 1984 [Appendix F]. Petitioners filed a notice of appeal on December 31, 1984.

Petitioners based their two Appellant's Briefs on the grounds mentioned in the opposition to demurrer (see supra), as well as the Federal grounds which upheld the constitutionality of Corbett v. Franchise Tax Board, 167 Cal.App.3d 808 [Appendix J], which they cited pursuant to Rule 977(b)(1) of the California Rules of Court since it was depublished under Rule 976(c)(2) of said Rules. It became clear during the June 5, 1986 oral argument, in the Court of Appeal below, that the court was not inclined to contemplate decisions and reasoning of a case decertified for publication by order of the California Supreme Court [Appendix I]. As the appended opinion of the court unmistakably shows (193 Cal.App.3d at 73), most

of the petitioners' contentions were not reached by the court. Among these are the Federal questions raised, reasoned, argued, and decided by the Corbett court whose decision is in conflict with that of the court below that petitioners pray a grant of Writ of Certiorari for.

On August 4, 1986, the petitioners filed a Petition for Review in the California Supreme Court to review the June 23, 1986 judgment [Appendix A], which was certified for publication on July 23, 1986 [Appendix B]. On August 4, 1986, the petitioners, pursuant to Rules 978(a) and 976.1 of the California Rules of Court, requested the California Supreme Court to publish in part the depublished Corbett opinion. On September 30, 1986, the California Supreme Court denied the August 4, 1986 (as amended on August 15) letter request to republish in part Corbett

[Appendix K]. On March 23, 1988, pursuant to rule 29.4 of the California Rules of Court, the petitioners filed a motion in the California Supreme Court to advance the case because of Mr. Loebner's newly discovered bone cancer that had a serious adverse prognosis. On March 31, 1988, the California Supreme Court dismissed the review [Appendix E], which it had granted on September 30, 1986 [Appendix D] and the Court's of Appeal June 23, 1986 judgment became final [Appendix C].

On April 29, 1988, the petitioners requested the Supreme Court for a second time to republish in part Corbett and to recall the remittitur of March 31, 1988, in order to remand the petitioners' cause to the court of appeal in light of the to be republished Corbett. This request was denied by the California

Supreme Court on May 25, 1988 [Appendix L].

On June 15, 1988, the petitioners applied to the Supreme Court of the United States for Extension of Time within which to file a Petition for Writ of Certiorari. An order to extend time to and including July 29, 1988 was signed by Associate Justice of the Supreme Court of the United States, Sandra D. O'Connor, on the 20th day of June 1988.

STAGE AND MANNER OF RAISING FEDERAL QUESTIONS BELOW

The above listed Federal Questions were raised at various stages of the proceedings at all three levels of courts below, the Superior Court, Court of Appeal, and Supreme Court of California.

The first Federal Question was raised specifically for the first time in the September 18, 1984 Memorandum in

Opposition to Demurrer to Complaint for Determination of Residency as follows:

> "Giving effect to section 19081 as a whole, to its every word, clause, and sentence so that no part or provision will be useless or meaningless, legislative intent can be gathered from the fact that this section's first sentence has two independent clauses, the first clause consistently interpreted as a full affirmation of the first (allegedly conflicting) constitutional provision that bars legal process interference with the collection of state taxes, and a second clause that should be interpreted as a proviso which details a legislatively mandated residency exception barring the Franchise Tax Board from completing the assessment process, followed by a second sentence which on its face clearly and unchallengeably affirms legislative will and intent of above proviso clause not to collect taxes while plaintiffs' action is pending in court; legislative intent of providing an exception to the provision of the general language containing the main clause of the first sentence can also be gathered from the fact that the above residency proviso has been attached to the above main clause for the likely purpose of avoiding injustice, oppression and potential conflict with the United States Constitution; legislative intent can be further gathered by presuming that the legislature would not enact a code section that is internally inconsis-

> tent but would rather enact one that introduces a special clause that deals expressly with a particular concern so that, in conformity with legislative practice, the special clause can exercise control over the conflicting general and main clause; legislative intent is finally gathered from an interpretation which removes an apparent conflict between section 19081 of the Revenue and Taxation Code and Article XIII, section 32 of the Constitution of the State of California by making the whole of section 19081 valid and operative rather than defeating it or rendering it without effect by a mere literal construction as the attorneys for defendant suggest (Article XIII, section 32 of the California Constitution, Section 19081 of the Revenue and Taxation code)." (Court Record Transcript for [CT] at 37-38.)

Federal question one was raised a second time in the Appellant's Opening Brief (filed December 23, 1985) in the context of reliance on Modern Barber Col. v. Cal. Emp. Stab. Com. 31 Cal.2d 720 (1948). Petitioners alleged that the California Supreme Court erred by depriving the litigant in Modern Barber, supra, of his Fourteenth Amendment

right. This was discussed under the heading of "Compounding of Judicial Error Results in Judicial Error." The petitioners consider the Modern Barber case the cornerstone of a long string of compounded errors leading to their own case. The relevant sentence mentioning the Federal Question is:

> "Not only is the result of the decision tantamount to depriving the appellant in Modern Barber of protection of the XIVth amendment, but it encroaches on the power of the Courts as well." (Appellant's Opening Brief [AOB] at 14:21-24.)

Federal question one was raised again several times in the Appellant's Reply Brief, filed February 6, 1986. Under the heading of "Respondent's authorities do not fall under the purview of the Stare Decisis doctrine," it stated:

> "On at least one occasion the [California] Supreme Court allowed an exception and held that 'the anti-injunction provision of the California Constitution [Cal. Const. at XIII, § 32] must yield to the paramount provisions of the United

States Constitution (Cal. Const., art. III, § 1)...' (Dupuy v. Superior Court 15 Cal.3d 410, 418...)." (Appellant's Reply Brief [ARB] at 28:16-21, also at 30:18-19)

Under the heading "The Corbett Court held that Sections 1060.5 and 19081 are Constitutional and the Supreme Court denied review," is stated:

"Appellants submit that this Court may not find it necessary to follow the path of reasoning hewed out by Corbett (at 819) when it relied on Dupuy v. Superior Court 16 Cal.3d 410, 418 to invoke the 'paramount provisions of the United States Constitution (Cal. Const., Art. III, section 1)' in order to make Art. XIII, section 32 yield on the theory that the legislature was mindful of the due process rights of nonresident taxpayers when it drafted the sections, that have been challenged by the Franchise Tax Board" (AOB 34-44)." (ARB at 35:1-8)

Under the heading "Proposition 1 and Proposition 8, enacted in 1933 and 1974, respectively, contained a joker--namely, 'section 32'" is stated:

"Appellants reassert that Proposition 1 of the 1933 Primary State Election and Proposition 8 of the 1974 General State Election contained a joker that

> tricked voters, unsuspecting the effect of the vastly expanded 'section 32', to vote in favor of propositions that lacked arguments in opposition and that stripped them of due process rights (AOB 34-44)." (ARB at 35:12-17)

In the Petition for Review by the Supreme Court, filed August 4, 1986, Federal question one was raised for the last time as follows:

> "The opinion is unattentive to elementary procedures of construction (citations in 16 Cal Jr 3d (Rev) Part 1, pp. 658-659), strings together out-of-context torn fragments (Opn. pp. 5-7) of this Honorable Court's Pacific Gas and Electric opinion, and fails to seek to harmonize article XIII, section 32 of the California Constitution and the 14th amendment of the U.S. Constitution with the Revenue and Tax Code section 19081 and Code of Civil Procedure section 1060.5)." (Petition for Review [PR] at 7.)

Federal questions two and three were first raised in a general way in the Complaint for Determination of Residency filed July 6, 1984 in Superior Court. On page 6 of the Complaint, the relevant sentence reads:

"This action is brought against the Franchise Tax Board on the grounds that its ruling of February 6, 1981, disallowing in its entirety plaintiff's protest of Deficiency Assessment for calendar year 1976 based on plaintiff's alleged California residency is erroneous, unconstitutional, and without authority of law." (CT at 6:15-19)

This same sentence also appears at Loebner v. Franchise Tax Bd. 193 Cal.App.3d 64, 67 (1987).

Federal questions two and three were raised for the second time in the Petition for Review where it is stated:

"In the present case, review of the Supreme Court is necessary to determine the newly raised, but federally important question of whether section 17014, subdivision (b) is unconstitutional under both California and U.S. Constitutions by violating the provisions of the 14th amendment that guarantees equal protection of laws and non-abridgment of privileges and immunities to federal officers and so that, in view of respondent's admission (Opn. p. 1) [supra 193 Cal.App.3d 64, 67 (1987)] that the appellants' alleged residence is based on the fact that they were in a special category of the federal employees and officers..." (PR at 9)

Under the heading "Appellate Court erred . . .," the following statement appears in the Petition for Review regarding Federal questions two and three:

> "We wish to plead that section 17014(b) of the Revenue and Taxation Code deprives us of our former rights as federal employees not to be transferred from a claimant non-resident under section 17015 to a claimant resident under section 17014(a) for Personal Income Tax purposes. We assert that we are protected from the arbitrary act of the State of California by the 14th amendment of the U.S. Constitution.
> "We propose to amend our original complaint (C.T. pp. 1-26) by alleging that subdivision (b) of section 17014 of the Revenue and Taxation Code, which the respondent's demurrer admits as being the sole basis of its determination of our California residence (Opn. p. 1; C.T. p. 22), is unconstitutional under California Constitution art I, section 7, subdivisions (a) and (b), which provide among others that a person may not be denied equal protection of laws and that a class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens as well as under the 14th amendment of the U.S. Constitution which provides among others that '[n]o State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deny to any person within its jurisdiction the equal protection of the laws.' We submit to this Honorable Court that the above section 17014(b) is unconstitutional because this law, made by the State of California and held against us by the Franchise Tax Board which wishes to enforce it, denies immunities which are provided by section 17015 of the Revenue and Taxation Code to all those federal officials and employees whose federal office or employment is identical with those who are designated as privileged by U.S. Congress under subdivision (s) of section 47.155/c of the 1973 Edition of the District of Columbia Code and because this law denies persons affected by it the protection otherwise provided them by section 17015. A part of section 18001(a) is also unconstitutional because it provides privileges to a class of federal officials and employees designated under section 17014(b), by enabling them to claim tax credits which cannot be claimed by other designees of 17014(b)."
(PR at 25-27)

REASONS FOR GRANTING THE WRIT

I

The first appellate district appeal court's doctrine of absolute, unexceptional and unequivocal prohibition

against prepayment litigation of taxes a) adjudicates personal jurisdiction over a federal Foreign Service Reserve Officer, who served a two-year duty at the American Embassy in Moscow, to the Franchise Tax Board of California, to collect personal income tax, when said adjudication is without a judicial hearing and violates due process, b) expands the limits of that doctrine beyond those set by the California Supreme Court and c) conflicts directly with the decision of the court of appeal of the second appellate district.

"[N]o state shall deprive any person of . . . property without due process of law." United States Constitution. It is self evident that a state's collection of personal income tax deprives persons of property. It therefore cannot be carried out constitutionally without due process of law. The respondent Franchise Tax

Board of California is a state administrative agency created by the California Legislature. It is authorized under the Personal Income Tax Law to collect personal income tax from California residents, but prohibited, under a provision of section 19081 of the Revenue and Taxation Code to collect such tax from persons who claim not to be residents during pendency of court action, instituted by them to have their residence status adjudicated under the provision of section 1060.5 of the California Code of Civil Procedure. (For the text of the above sections 1060.5 and 19081, see pages 6-8 supra.)

In its August 27, 1984 Memorandum of Points and Authorities in Support of Demurrer, the respondent Franchise Tax Board created a logical conundrum out of a fairly straightforward matter and the courts below neither recognized nor saw

through this conundrum. Respondent stated that "the cited statutes purport[9] to allow what the Constitution absolutely[10] forbids: declaratory relief against state tax assessments."

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9. The word "purport" has little evidential value and no legal import, even though during the June 5, 1986 oral argument the court below praised attorney for respondent for its use. "The word 'purporting' means what appears on the face of the instrument. It means the apparent, and not the legal, import. (23 Am. & Eng. Ency. of Law, -2d ed.-527)" McCraney v. Glos, 222 Ill. 628, 631 (1906). "[T]he word 'purport' should be given its usual, ordinary meaning. Webster's New International Dictionary, 2d Ed., defines 'purport' as follows: 'To convey, imply or press outwardly, as one's (esp. a thing's) meaning, intention, or true character; to have the appearance, often specious appearance, of being, intending, claiming, etc. (that which is implied or inferred); ***'" United States v. 30 Cases, Etc., 93 F.Supp. 764, 769 (1950). Neither respondent nor the courts below provided analysis or reasons for the purported conflict between the laws.

10. For the absolute, exclusive and unexceptional requirement of postpayment litigation of taxes, interpretation of section 32, article XIII of the California Constitution, the respondent relied upon dicta in Pacific Gas and Electric Co. v. State Board of Equalization 27 Cal.3d 277 (1980) and State Bd. of Equalization v. Superior

Court Record Transcript at 31 (emphasis added). This "purported" conflict between the two above mentioned statutes and section 32, article XIII of the state constitution was accepted as an indubitable and certain fact by the trial court from the very outset.[11] The petitioners' arguments of the state statute's constitutionality, as mandated by the due process clause, were ignored or called unpersuasive by the courts below, who neither questioned nor examined the state's very right to collect an income tax from a claimant of non-residency before establishing personal jurisdiction of him. The fact that there can be

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Court 39 Cal.3d 633 (1985). Brief of Respondent at 5 and 6. This interpretation has now been superseded by Western Oil & Gas Assn. v. State Bd. of Equalization 44 Cal.3d 208 (1987) stating at 213: "but we reject the Board's contentions that the provision [of section 32] bars all prepayment challenges to the Board's authority." (Emphasis in the original.)

11. See reporter's transcript in Appendix N.

no interference with tax collection if the state has no right to collect the tax remained disguised by a conundrum that the respondent had fabricated. The respondent's insistence that the State Constitution requires tax collection before personal jurisdiction, places the cart before the horse . . . and denies petitioners' due process of law.

It was clearly stated in Woodruff v. Perry 103 Cal 611 and mentioned with approval in Los Animas etc. Land Co. v. Preciado, 167 Cal. 581 (1914) that "[t]here can be no interference, therefore, with the just revenues of this district in enjoining it from collection of the tax against one individual since in no sense has it the right to collect such a tax. . . ." The since depublished Corbett v. Franchise Tax Board 167 Cal.App.3d 808, 818 (1985) [Appendix J] relies on Shaffer v. Carter

252 U.S.37, 52-53 (1920) and Travis v. Yale & Towne Mfg. Co. 252 U.S.60, 68 and 75-76 (1920), among others, for the proposition that "a state is without power to impose an income tax unless it has jurisdiction of the person taxed" and that "[a] statute imposing a personal tax on persons over whom the State has no jurisdiction conflicts with the Fourteenth Amendment and is taking property without due process of law. . . ." In the case before this Court, section 19081 has deprived the Franchise Tax Board of the right to collect a personal income tax from persons who institute and continue action under section 1060.5 Therefore there cannot be interference with the lawful revenue collection of the Board while judicial jurisdictional determination of the petitioners' alleged residency takes place. In fact,

in its decision, the court below adjudicated personal jurisdiction over the petitioners to an administrative agency when neither statute nor constitution do so.

In recent years this Court has examined personal jurisdiction in relationship to due process a number of times. Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694, 713 (1982); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-293 (1980); Shaffer v. Heitner, 433 U.S. 186, 216 (1977); Hanson v. Denckla 357 U.S. 235, 251 (1958); International Shoe Co. v. Washington 326 U.S. 310, 316 (1945). It held that under traditional principles, the due process question to be decided is whether "minimum contacts" exist between petitioners and the forum State that would justify the State in exercising personal jurisdiction. This due process

question is to be decided in the present case within the framework of section 17014 of the California Revenue and Taxation Code in accordance with section 19081 of that Code.

The sole reliance of the courts below on Pacific Gas and Electric is misplaced since even that 1980 opinion, whatever it meant, has now been superseded by Western Oil & Gas Assn.[12] (see fn. 10, supra). It is important that this Court decide, whether among the permitted limited judicial interventions (see fn. 12) is

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12. The seriousness of the California Supreme Court's modified construction of section 32 can be gleaned from its very recent (March 31, 1988) transfer of Union Pacific R.R. Co. v. State Bd. of Equalization 192 Cal.App.3d 487 (1987) to Ct.App. 1st Dist., Div. 5, to reconsider in light of Western Oil & Gas Assn. v. State Bd. of Equalization 44 Cal.3d 208 (1987). The reconsidered May 24, 1988 opinion Union Pacific R.R. Co. v. State Bd. of Equalization 201 Cal.App.3d 647, 656 (1988) indeed cites Western Oil & Gas Assn., supra, 44 Cal.3d 208 and states that while "section 32 applies. . . . [n]onetheless limited judicial intervention is permitted. . ."

the statutory authorized declaratory relief for receiving a judicial determination of residency status of Egon E. Loebner who was, for nearly two years, Chief of the Science Section at the American Embassy in Moscow and appointed by President Ford a Consular Officer and a Secretary in the Diplomatic Service of the United States. (See sections 1060.5, 19081 and 17014.)

Besides correcting the unjust and wrong decision of the courts below, it is important that this Honorable Court grant this petition to resolve the Federal question conflict between two California courts of appeal [Appendices A and J] and remove the uncertainty that causes the remedy provided by California to claimants of nonresidency under the

Personal Income Tax Law to be anything but plain.[13]

This uncertainty is further accentuated by orders of the California Supreme Court to depublish[14] both Loebner [Appendix E] and Corbett [Appendix I]. The mystery and dilemma thus created have been described by the Dean of the Santa Clara University

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13. For a discussion of the Federal requirement that a state tax remedy must be plain and not uncertain petitioners rely upon Roswell v. La Salle Nat. Banks 450 U.S. 503, 516-517 (1981).

14. To gain insight into California depublication see Grodin, The Depublication Practice of the California Supreme Court, 72 Calif.L.Rev. 514 (1984). Petitioners also pointed out in their Appellant's Reply Brief at 24 (fn. 11) as follows: "While the Corbett decision adds to the persuasiveness of the appellant's argument, depublication may detract from it. This is so because it is the current practice of the [California] Supreme Court to give no reason for depublication. Fortunately, the Court of Appeal can get some guidance from the following quote: 'Depublication is most frequently used when the court considers the result to be correct, but regards a portion of the reasoning to be wrong and

School of Law in the June 1988 issue of California Lawyer.[15]

Finally, this Honorable Court should grant the writ because no state should extend its jurisdiction beyond the limits set by the due process rights of persons over whom the state claims jurisdiction. This court has been diligent over the years defining these limits. This case adds a new dimension and new twist to this quest. It requires focusing on state efforts to interpret its Constitution in a manner that disguises attempts to expand its

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misleading.' (Grodin . . . 72 California Law Review 514, 522)." Despite the three orders not to publish Corbett [Appendices I, K and L], petitioners continue to believe the result is correct.

15. "A classic example of the mystery that depublication injects into the law is offered by one of the cases depublished by the Lucas court. In 1985, the Bird court depublished a Second District opinion holding that § 19081 of the Revenue and Taxation Code was an exception to the normal constitutional requirement that taxes be

jurisdiction through a claim of lacking jurisdiction. The resolution of this conundrum is simple: jurisdiction over subject matter is different from jurisdiction over a person. The guiding question is: Which has to be adjudicated ahead of the other in order to satisfy due process?

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prepaid before their imposition can be challenged in court. Corbett v. Franchise Tax Bd., 167 CA.3d 808. A year later, a First District opinion declared that the same section of the code, allowing a challenge to a determination of residency, was governed by the constitutional requirement of prepayment. The Bird court granted a hearing, but the Lucas court vacated the grant and depublished the case. Loebner v. Franchise Tax Bd., 184 CA.3d 497; reprinted to permit tracking, 193 CA.3d 64. Thus two contradictory rulings on the same issue were both depublished. How should a lawyer now advise a client on the applicability of § 19081? Worse yet, how would a lawyer even know the issue has recently been decided both ways by different districts of the court of appeal?" Uelmen, The Lucas Court: A First-Year Report Card 8 California Lawyer 30, 31 (June 1988).

II

The State of California Law which transfers certain federal employees from the class of "nonresidents" to the class of "residents" is discriminatory and violates the Equal Protection clause by establishing a class distinction unrelated to the purposes of this law.

The purpose of section 17014 of the California Revenue and Taxation Code is to establish a framework to regulate administrative determination and judicial adjudication of the state's personal jurisdiction to assess and collect personal income tax. The section's subdivision (a)(1) defines "residency" of those individuals who are in the state and subdivision (a)(2) those who are outside the state. Subdivisions (b)(1), (b)(2), and (b)(3) define three categories of federal employees that are to be considered reclassified as

"residents" of type (a)(2), even though they otherwise could be "nonresidents" under section 17015 of this Code. Petitioners have challenged the constitutionality of section 17014(b) in the courts below. They believe that 17014(b)(3) is discriminatory since the distinction made between certain presidential appointees to the executive branch of the United States Government (i.e., those subject to confirmation by the Senate of the United States and whose tenure is at the pleasure of the President of the United States) and other appointees to the executive branch is arbitrary and unrelated to the goals and purposes of California's Personal Income Tax Law. The mode of appointment to the federal office has no relevance or relationship whatsoever to the nature of minimal contacts of that official to the State of California, while that official

holds his or her appointive office. It is the nature of these contacts that decides whether an individual outside the state is a "resident".

Over the years this Court has said that "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Ferguson v. Skrupa, 372 U.S. 726, 732 (1963). The discrimination in section 17014(b)(3) is invidious because it deprives the discriminated persons of property. "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the

amendment." Barbier v. Connolly, 113 U.S. 27, 32 (1885). Section 17014(b)(3) is prohibited class legislation because it affects some among similarly situated persons differently from others. Whether appointed to their office by the president or by some other official, appointees to an office in the executive branch of the federal government are similarly situated as to their nexus to the state in which they are domiciled. "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910). The classification in section 17014(b)(3) does not rest upon a

ground that has a fair and substantial relation to the object of the legislation. It rests instead on the classification of a District of Columbia Code unrelated to the object of the California law. Former § 47.1551c, subdiv. (s), now paragraph (17) of section 47-1801.4.

It can be clearly seen from the last paragraph in respondent's affirmation of its determination of petitioners' residency under section 17014(b) [Appendix H] that petitioners were considered members of the discriminated class in legislation prohibited by the Fourteenth Amendment of the United States Constitution. This illegal and unconstitutional determination is the grounds for the litigation now placed before this Honorable Court.

The importance that this Court should attach to this federal question

extends far beyond the injustice created by the California Legislature to the petitioners and similarly situated persons. It reaches into the very heart of federalism since the State of California meddles into the affairs of the federal government. This meddling into the practices of appointments to the executive branch can significantly diminish the number of persons willing to accept such appointments. It can thus have a negative influence on the federal government, diminishing its power to attract the most able, talented and suitable persons into government service. Such inroads by California into the exclusive province of federal government powers could spread to other states and create a problem for the governance of the United States.

In order to set limits on state meddling in federal affairs, this Court should grant this writ.

III

The State of California Law which transfers certain federal employees from the class of "nonresidents" to the class of "residents" abridges the petitioners' privileges and immunities granted them by the President of the United States and violates the Privileges and Immunities Clause of the Fourteenth Amendment.

One of the privileges and immunities, granted by President Gerald R. Ford to petitioner Egon E. Loebner on the occasion of his appointment to Consular Officer and Secretary in the Diplomatic Service of the United States [Appendix M], is the immunity from being taxed by the country of his diplomatic post. This immunity is being abridged

by the State of California in alleging that he is a resident under section 17014(b).[16]

The petitioners' research found no federal cases which expressly address "privileges and immunities of citizens of the United States which no state can abridge" guaranteed by this great country's Constitution to those of its citizens who "share the [federal government's] offices" and "engage in administering its functions." Slaughter-House Cases, 16 Wall. 36, 78-79 (1872) quoting in part Crandall v. Nevada 6 Wallace 36 (1867). The present case involves such privileges and immunities, granted by the authority of

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16. It must be presumed that the respondent Franchise Tax Board of California had determined that Mr. Loebner's position as Foreign Service Reserve Officer did not qualify him for the exemption to being reclassified under section 17014(b)(3) accorded to "career appointees in the United States Foreign Service."

the President of the United States [Appendix M]. These privileges and immunities have been abridged by the California law (Section 17014(b)).

Petitioners respectfully suggest that the present case before this Honorable Court is one of the future cases anticipated 116 years ago by Slaughter-House Cases, supra, at 78-79. At that time, the Supreme Court of the United States stated: "[W]e may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so." Petitioners believe that their case involves immunities of United States citizens who shared in the federal government's offices by virtue of the appointment of Mr. Loebner as Foreign Service Reserve Officer and who

engaged in administering the Diplomatic Service function of the United States.

Even though over a hundred years have passed since Slaughter-House Cases without its anticipated case making an appearance, the current case may be the one that makes it necessary to define more clearly the privileges and immunities of citizens of the United States which no state can abridge.

It is important that this Honorable Court grant this writ in order to establish the limits that state governments can go to when attempting to interfere with the immunities and privileges of officials of the federal government and with the federal government's administrative functions.

CONCLUSION

For these reasons, this petition for certiorari should be granted. Without the petition for grant of certiorari,

the constitutionality of the four above discussed California statutes[17] could remain undecided for a very long time.

Respectfully submitted,

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July 27, 1988

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17. Section 32 of Article XIII of the California Constitution; Section 1060.5 of the Code of Civil Procedure; Sections 17014 and 19081 of the Revenue and Taxation Code.

88-174

Supreme Court, U.S.
FILED
JUL 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

EGON and SONYA LOEBNER,

PETITIONERS,

v.

FRANCHISE TAX BOARD OF CALIFORNIA,

RESPONDENT.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT, DIVISION FOUR, CASE A030189 (SF 25067, CALIFORNIA SUPREME COURT)

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APPENDIX A

COPY OF OPINION OF THE CALIFORNIA COURT OF APPEAL WHOSE DECISION IS SOUGHT TO BE REVIEWED (FILED JUNE 23, 1986)

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

EGON and SONYA LOEBNER,

Plaintiffs and Appellants,

v.

FRANCHISE TAX BOARD,

Defendant and Respondent.

A030289

(San Francisco
City and County
Sup. Ct. No. 826409)

[193 Cal.App.3d 67]

Plaintiffs Egon and Sonya Loebner appeal from a judgment of dismissal entered after the trial court sustained without leave to amend the demurrer of defendant Franchise Tax Board (the Board) to their complaint for a judicial determination that a personal income tax deficiency assessment by the Board was illegal. The principal issue presented is whether plaintiffs could institute this action without first paying the amount of the disputed assessment. We conclude that this question must be answered in the negative and that the trial court consequently acted properly in sustaining the Board's demurrer and dismissing the complaint.

I

We must treat the Board's demurrer as admitting all of the material factual allegations of plaintiffs' complaint,

with the exception of contentions, deductions, or conclusions of either fact or law. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58]; Serrano v. Priest (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187].) Our aim is to decide whether the complaint suffices to state a cause of action. (Glaire v. La Lanne Paris-Health Spa, Inc. (1974) 12 Cal.3d 915, 918 [117 Cal.Rptr. 541, 528 P.2d 357].)

In their verified "Complaint for Determination of Residency," plaintiffs alleged as follows: Plaintiffs were residents of California until December of 1974, at which time they left in order that Mr. Loebner could begin serving as a member of the United States embassy in the Soviet Union. They "engaged a real estate agent to look after their residence" in Palo Alto. Their household

effects and personal belongings were "liquidated," shipped to Moscow, or stored in "a State Department designated location." Mr. Loebner terminated various personal and professional associations in California. Plaintiffs transferred their medical records, financial accounts, and their mailing address, to locations outside of the state. They did not vote in California in 1975, nor did they file a California personal income tax return for that year. Plaintiffs returned to California in November of 1976. Thereafter they and the Board engaged in administrative proceedings which culminated with a determination that plaintiffs owed tax and interest for the calendar year 1976 amounting to approximately $3,400.

Plaintiffs' complaint ended in this fashion: "This action is brought against the . . . Board on the grounds that its

ruling . . . disallowing in its entirety plaintiffs' protest of [the Board's] Deficiency Assessment for calendar year 1976 based on Plaintiffs' alleged California residency is erroneous, unconstitutional, and without authority of law. By reason thereof, Plaintiffs

[193 Cal.App.3d 68]

allege that the . . . proposed deficiency assessment . . . is illegal and hence subject to cancellation by this action. [¶] WHEREFORE, Plaintiffs pray for judgment against the . . . Board dismissing the Deficiency Assessment and declaring plaintiffs to be [sic] nonresidents of California for the first ten months of calendar year 1976."

The Board demurred to the complaint on the grounds that (1) the trial court "has no jurisdiction over the subject of the action" and (2) the complaint failed to state facts sufficient to constitute a

cause of action against the Board. After conducting a hearing on the demurrer, the trial court sustained it on both of these grounds. A judgment of dismissal followed, prompting this timely appeal.[1]

---

1. In their notice of appeal plaintiffs, who at all times have proceeded in propria persona, purport to appeal from "the order of the Court sustaining the demurrer of [the] Board." That order is not appealable (I. J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal.3d 327, 331 [220 Cal.Rptr. 103, 708 P.2d 682]; Youngblood v. Board of Supervisors (1978) 22 Cal.3d 644, 651 [150 Cal.Rptr. 242, 586 P.2d 556]), but its merits can be reviewed on an appeal from the ensuing judgment of dismissal. (Selleck v. Globe International, Inc. (1985) 166 Cal.App.3d 1123, 1128, fn. 1 [212 Cal.Rptr. 838]; Gibson v. Government Employees Ins. Co. (1984) 162 Cal.App.3d 441, 444 [208 Cal.Rptr. 511].) Pursuant to the rule requiring that a notice of appeal be liberally construed in favor of its sufficiency (Cal. Rules of Court, rule 1(a)), we treat plaintiffs' notice as having taken a valid appeal from the subsequently entered judgment of dismissal. (Id., rule 2(c); Turpin v. Sortini (1982) 31 Cal.3d 220, 224, fn. 2 [182 Cal.Rptr. 337, 643 P.2d 954]; Battle v. Kessler (1983) 149 Cal.App.3d 853, 855 [197 Cal.Rtpr. 170]; Joffe v. United California Bank (1983) 141 Cal.App.3d 541, 547, fn. 1 [190 Cal.Rptr. 443].)

REVIEW

II

Article XIII, section 32 of the California Constitution (hereinafter referred to as section 32) provides:

> "No legal or equitable process shall issue in any proceeding in any court against the State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

The Board's position, steadfastly maintained in both the trial court and here, is that section 32 is an absolute barrier against any type of attempt to secure any form of judicial relief regarding tax-related matters unless and until the tax has been paid. Plaintiffs contend that section 32 is by its express terms limited to actions for "collection of any tax" and does not affect their complaint for declaratory relief to

determine the validity of an assessment. The trial court believed itself bound to accept the Board's argument So do we.

[193 Cal.App.3d 69]

In Pacific Gas & Electric Co. v. State Bd. of Equalization (1980) 27 Cal.3d 277 [165 Cal.Rptr. 122, 611 P.2d 463], the supreme court considered whether section 32 barred an attempt to compel the Board of Equalization to reassess property in accordance with the then recently enacted Proposition 13 (Cal.Const., art. XIII A). The means chosen by the taxpayers to effect this reassessment was a petition for a writ of mandamus. The court, in the course of holding that this form of relief was precluded by section 32, made the following statements which possess a particular pertinency to this appeal:

"On its face the provision [section 32] appears to bar actions of the type

before us. It is certainly true that the assessment of real property is an integral part of the taxing process, and a court order invalidating an assessment will in effect 'prevent or enjoin the collection' of the tax. [Citations.] It is also the rule that a taxpayer may not circumvent restraints on prepayment tax litigation by seeking only declaratory relief." (27 Cal.3d 277 at p. 280.)

"The policy behind section 32 is to allow revenue collection to continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted. [Citation.] 'Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.' [Citations.] To implement this policy, a specific statutory refund

procedure has been provided for taxpayers whose property has been improperly assessed. [Citations.] And to compensate a taxpayer who has been wrongfully required to pay, interest will be awarded on the refunded money. [Citation.] The utilities have attempted to circumvent this statutory scheme in an effort to obtain adjudication of their claims before payment. [¶] We hold that section 32 means what it says. Nothing in the policy underlying the section, its history, or the cases construing it, would support an exception . . . ." (27 Cal.3d 277 at pp. 283-284.)

The court in Pacific Gas & Electric Co. termed section 32 an "unequivocal constitutional prohibition against prepayment tax litigation." (27 Cal.3d 277 at p. 281.) Plaintiffs have marshalled an impressive array of materials relating to the current and

predecessor versions of section 32 to support a variety of arguments that this decision misperceived the intent of the voters who enacted the versions of section 32; that the court misconstrued previous decisions; and that Pacific Gas & Electric Co. should not be followed because it is "erroneous." These arguments are not persuasive. Pacific Gas & Electric Co. must be applied and followed without regard to our opinion as to its soundness. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 259 P.2d 937].)

[193 Cal.App.3d 70]

Pacific Gas & Electric Co. has recently been reiterated by the Supreme Court (State Bd. of Equalization v. Superior Court (1985) 39 Cal.3d 633, 638-640 [217 Cal.Rptr. 238, 703 P.2d 1131]) and accepted without hesitation by other courts. (People ex rel. Franchise Tax

Bd. v. Superior Court (1985) 164 Cal.App.3d 526, 543-546 [210 Cal.Rptr. 695]; United States Steel Corp. v. Franchise Tax Board (1983) 144 Cal.App.3d 473, 481-482 [192 Cal.Rtpr. 677]; Hunter-Reay v. Franchise Tax Board (1983) 140 Cal.App.3d 875, 878-881 [189 Cal.Rptr. 810].)

The final paragraphs of plaintiffs' complaint were quoted ante to demonstrate that they are in effect seeking declaratory relief that the Board's deficiency assessment is illegal. This they do not dispute. "An action for declaratory relief is an equitable proceeding." (Fowler v. Ross (1983) 142 Cal.App.3d 472, 478 [191 Cal.Rptr. 183]; see 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 87, [¶] (8), p. 115; 5 id., Pleading, § 800, [¶] (c), p. 244.) (3c) As such, plaintiffs' complaint is within the express terms of section 32

("No . . . equitable process shall issue . . ."") and likewise encompassed by the Supreme Court's construction of that provision to prohibit declaratory relief actions against assessments. (Pacific Gas & Electric Co. v. State Bd. of Equalization, supra, 27 Cal.3d 277 at p. 280.) It thus appears that plaintiffs' complaint is premature and barred by section 32 until they have paid the Board's assessment.

III

In apparent anticipation of this conclusion, plaintiffs make several arguments in support of their claim that section 32 is "voidable," which we take to mean that it is ineffective. As will be demonstrated, plaintiffs' arguments are unpersuasive.

(A)

In 1971 the California Constitutional Revision Commission submitted to the

Legislature a report recommending changes in article XIII of the constitution, which governed taxation. The commission specifically recommended that the substance of article XIII, section 15, paragraph 3--the predecessor version of section 32--should be deleted from the proposed text of the revised article XIII and dealt with by statute. In May of 1974, the Assembly Committee on Revenue and Taxation received a report from the "Constitutional Revision Task Force on Article XIII" which included a recommendation that section 32 should be set forth in its current constitutional form. The latter recommendation was adopted by the Legislature when it voted to submit to the electorate an amendment proposal

[193 Cal.App.3d 71]

to revise and reorganize article XIII. This measure was approved by the voters at the November 1974 General Election.

Plaintiffs now contend that because representatives of the Franchise Tax Board and the State Board of Equalization were members of the task force which drafted section 32 they thus encroached upon the legislative prerogatives of the Legislature. Plaintiffs ask us to hold that this violated article III, section 3 of the California Constitution, which reads:

"The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Plaintiffs' argument evidences a fundamental misperception of the nature of the process by which section 32 was enacted. It has been said that an act is "legislative" if it declares a public purpose or policy and makes provisions

for its accomplishment. (See Merriman v. Board of Supervisors (1983) 138 Cal.App.3d 889, 891 [188 Cal.Rptr. 343].) Legislative power is exercised when such a policy is adpoted, thus giving it the force of law. (Cf. Yost v. Thomas (1984) 36 Cal.App.3d 561, 570-571 [205 Cal.Rptr. 801, 685 P.2d 1152]; Horn v. County of Ventura (1979) 24 Cal.3d 605, 613 [156 Cal.Rtpr. 718, 596 P.2d 1134].) Within the context of constitutional amendments, adoption is by the people. (See Cal.Const. art. XVIII, § 4.) The Legislature may propose constitutional amendments, but only the people can enact them. In this sense, the ultimate "legislative" power is retained by the people. (See Carlson v. Cory (1983) 139 Cal.App.3d 724, 728 [189 Cal.Rtpr. 185]; Citizens Against a New Jail v. Board of Supervisors (1976) 63 Cal.App.3d 559, 563, [134 Cal.Rptr. 36]; cf. Cal. Const.,

preamble ["We, the People of the State of California . . . do establish this Constitution"]; id., art. II, § 1 ["All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."].)

Viewed from this perspective, plaintiffs' conception of the separation of powers, in the ordinary trilateral division of executive, judicial, and legislative, is incorrect. Section 32 was enacted by the people in the exercise of their legislative power. The fact that certain representatives of taxing bodies may have participated in the drafting of the proposed constitutional amendment has no tainting effect because these persons had no influence in the people's legislative decision to enact

and give the binding force of law to that proposal.

(B)

Plaintiffs next assert that, in effect, the people did not know what they were doing by enacting the revisions to article XIII because they were "misinformed and misled" by the ballot pamphlet materials.

[193 Cal.App.3d 72]

The amendment passed by the voters in 1974 completely revised the constitutional provisions relating to taxation, one of the most complicated yet necessary powers of modern government. The changes between the immediate predecessors of section 32 and section 32 were minimal.[2]

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2. The earlier version provided: "No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article, but after payment thereof [an]

The predecessor version had been judicially construed in the same manner as would section 32. (See Aronoff v. Franchise Tax Board (1963) 60 Cal.2d 177, 178-180 [32 Cal.Rptr. 1, 383 P.2d 409].) In these circumstances, the minor changes embodied in section 32 obviously did not qualify as a chief purpose which had to be included in the ballot summary. (Elec. Code, § 3503; Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 242-244 [149 Cal.Rptr. 239, 583 P.2d 1281]; Epperson v. Jordan (1938) 12 Cal.2d 61, 65-71 [82 P.2d 445]; Tinsley v. Superior Court (1983) 150 Cal.App.3d 90, 108-109 [197 Cal.Rptr. 643].)

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action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected." (Former Cal. Const., art. XIII, § 15, [¶] 3.)

Plaintiffs' contention that the voters did not know what they were doing merits only brief comment. This type of claim seems to be routinely made against any enactment passed by the voters. It is invariably rejected. (See, e.g., Brosnahan v. Brown (1979) 32 Cal.3d 236, 251-252 [186 Cal.Rptr. 30, 651 P.2d 274]; Fair Political Practices Com. v. Superior Court (1979) 25 Cal.3d 33, 42 [157 Cal.Rptr. 855, 599 P.2d 46]; Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra, 22 Cal.3d 208 at pp. 231, 243-244.) We do likewise.

IV

Plaintiffs have not pinned all of their hopes on their full-out assault on section 32. They have a fall-back position, which is that their complaint is authorized by certain statutes which

remove their complaint from the prohibitory ambit of section 32.

The statutes upon which plaintiffs rely are Revenue and Taxation Code section 19081 and Code of Civil Procedure section 1060.5.[3] The former is the

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3. Revenue and Taxation Code section 19081 provides:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of this State to prevent or enjoin the assessment or collection of any tax under this part; provided, however, that any individual after protesting a notice or notices of deficiency assessment issued because of his alleged residence in this State and after appealing from the action of the Franchise Tax Board to the State Board of Equalization, may within 60 days after the action of the State Board of Equalization becomes final commence an action, on the grounds set forth in his protest, in the Superior Court of the County of Sacramento, in the County of Los Angeles or in the City and County of San Francisco against the Franchise Tax Board to determine the fact of his residence in this state during the year or years set forth in the notice or notices of deficiency assessments. No tax under this part based solely upon the residence of such

more important. The first clause of Revenue and Taxation section 19081 is substantially identical to the first sentence of section 32. Where this statute differs from section 32 is it does not include section 32's express requirement of payment preceding judicial proceedings, and in the statute's clearly expressed application to assessments. These differences do not, however, warrant sustaining plaintiffs' contention.

It is true that section 32 does not expressly refer to assessments, but the supreme court has unmistakably held that it does. (See part II, ante.)

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an individual shall be collected from such individual until 60 days after the action of the State Board of Equalization becomes final and, if he commences an action pursuant to this section, during the pendency of such action, other than by way of or under the jeopardy assessment provisions of this part."

Erroneously believing that the application of section 32 to assessments is an "ambiguity" which remains an open question, plaintiffs assert that an "unclear" constitutional provision "must yield to [a] clear statute." The supremacy of a constitution over a statute has been unchallenged since Marbury v. Madison (1803) 5 U.S. (1 Cranch) 137 [2 L.Ed. 60]. It applies in California. People v. Navarro (1972) 7 Cal.3d 247, 260 [102 Cal.Rptr. 137, 497 P.2d 481]; Molar v. Gates (1979) 98 Cal.App.3d 1, 24 [159 Cal.Rptr. 239, 12 A.L.R.4th 1197].) In California, a general constitutional provision prevails over a specific statute. (See Associated Home Builders etc, Inc. v. City of Livermore (1976) 18 Cal.3d 582, 595 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038].)

The parties make other contentions which we do not reach because they could have no effect upon our decision.

V

It has been shown that California's fundamental law, as expressed in its constitution and by its highest court, prohibits prepayment tax litigation. An allegation that plaintiffs had paid the tax assessed by the Board was essential to their complaint. (See McHugh v. County of Santa Cruz (1973) 33 Cal.App.3d 533, 544 [109 Cal.Rptr. 149].) Without it they failed to state a cause of action. Such an allegation was also essential to the

[193 Cal.App.3d 74]

trial court's jurisdiction. (See Arnoff v. Franchise Tax Board, supra, 60 Cal.2d 177 at pp. 178-181; Estate of Schneider (1944) 62 Cal.App.2d 463, 465-466 [145 P.2d 90].) It thus appears that both

grounds of the Board's demurrer were sound. There being no possibility that plaintiffs could cure this defect by amending their complaint, the trial courft properly sustained the demurrer without granting leave to amend. (Blank v. Kirwan, supra, 39 Cal.3d 311 at p. 317; Martinez v. Sonoma Cos. (1974) 11 Cal.3d 394, 400 [113 Cal.Rptr. 585, 521 P.2d 841].)

The judgment of dismissal is affirmed.

Sabran, J.

WE CONCUR:

Anderson, P. J.

Poche, J.

APPENDIX B

COPY OF CERTIFICATION FOR PUBLICATION OF THE OPINION OF THE CALIFORNIA COURT OF APPEAL WHOSE DECISION IS SOUGHT TO BE REVIEWED (FILED JULY 23, 1986)

COURT OF APPEAL OF THE

STATE OF CALIFORNIA

in and for the

FIRST APPELLATE DISTRICT

DIVISION FOUR

EGON LOEBNER, et al.,

PLAINTIFF AND APPELLANT,

v.

FRANCHISE TAX BOARD,

DEFENDANT AND RESPONDENT.

NO. A030289

SAN FRANCISCO NO. 826409

BY THE COURT:

The written opinion which was filed on June 23, 1986 has now been certified for publication pursuant to rule 976(b) of the California Rules of Court, and it is therefore ordered that it be published in the Official Reports.

Dated: July 23, 1988 Anderson P. J.

APPENDIX C

COPY OF CERTIFICATION THAT THE DECISION OF THE CALIFORNIA COURT OF APPEAL WHOSE DECISION IS SOUGHT TO BE REVIEWED HAS BECOME FINAL (FILED MARCH 31, 1988)

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT
DIVISION FOUR

LOEBNER, EGON E.
2934 Alexis Drive

Palo Alto, CA 94304

LOEBNER, EGON, ET AL.
vs.
FRANCHISE TAX BOARD
A030289
San Francisco County No. 826409

* * REMITTITUR * *

I, RON D. BARROW, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the decision entered in the above-entitled cause on June 23, 1986 has now become final.

____Appellant ____ Respondent to recover costs
____Each party to bear own costs
____Costs are not awarded in this proceeding
____See decision for costs determination

Witness my hand and the seal of the Court affixed at my office this

RON D. BARROW, Clerk

By: C. HOO

Deputy

APPENDIX D

COPY OF ORDER BY THE CALIFORNIA SUPREME COURT GRANTING REVIEW
(FILED SEPTEMBER 30, 1986)

SF 25067

ORDER GRANTING REVIEW
AFTER JUDGMENT BY COURT OF APPEAL
First District, Division Four
No. A030289

THE SUPREME COURT OF THE STATE
OF CALIFORNIA

IN BANK

LOEBNER, ET AL., Appellants

v.

FRANCHISE TAX BOARD, Respondent

Appellant's petition for review GRANTED.

Submission of of additional briefing, otherwise required by rule 29.3, California Rules of Court, is hereby deferred pending further order of the court.

BIRD
Chief Justice

BROUSSARD
Associate Justice

REYNOSO
Associate Justice

GRODIN
Associate Justice

APPENDIX E

COPY OF ORDER OF THE CALIFORNIA
SUPREME COURT DISMISSING REVIEW
(FILED MARCH 31, 1988)

No. S.F. 25067

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

LOEBNER

v.

FRANCHISE TAX BOARD

Pursuant to Rule 29.4 (c), California Rules of Court, the above-entitled review is DISMISSED and the cause is remanded to the Court of Appeal, First Appellate District, Division Four.

See Rule 976 (d), California Rules of Court.

LUCAS
Chief Justice

BROUSSARD
Associate Justice

PANELLI
Associate Justice

ARGUELLES
Associate Justice

Associate Justice

Associate Justice

Associate Justice

APPENDIX F

COPY OF JUDGMENT OF DISMISSAL OF THE
CALIFORNIA SUPERIOR COURT
(FILED NOVEMBER 27, 1984)

JOHN K. VAN DE KAMP, Attorney General
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SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

EGON and SONYA LOEBNER,

Plaintiffs,

v.

FRANCHISE TAX BOARD,

Defendant.

No. 826409

JUDGMENT OF DISMISSAL

WHEREAS, the demurrer of defendant Franchise Tax Board to plaintiffs' complaint has been sustained without leave to amend on the grounds that the Court has no jurisdiction over the subject of the action and that said

complaint fails to state facts sufficient to constitute a cause of action against said defendant; and

WHEREAS, application has been made for entry of judgment in favor of defendant and against plaintiffs; and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DEGREED that this action be and the same hereby is dismissed with prejudice; plaintiffs are to take nothing against said defendant by this action and said defendant is to recover their costs of suit herein.

Dated: November 23, 1984

_____

Judge of the Superior Court

APPENDIX G

COPY OF ORDER SUSTAINING DEMURRER OF
THE CALIFORNIA SUPERIOR COURT
(FILED NOVEMBER 27, 1984)

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SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

EGON and SONYA LOEBNER,

Plaintiffs,

v.

FRANCHISE TAX BOARD,

Defendant.

No. 826409

ORDER SUSTAINING DEMURRER
WITHOUT LEAVE TO AMEND

The demurrer of defendant Franchise Tax Board to the complaint in the above-entitled action came on regularly for hearing on September 28, 1984. John K. Van de Kamp, Attorney General, by Patricia Streloff, Deputy Attorney

General, appeared as counsel for said defendant, and Egon E. Loebner appeared in pro per on behalf of plaintiffs. The matter was argued and submitted to the Court for decision. Upon due consideration, and good cause appearing therefore,

IT IS ORDERED that the demurrer of defendant Franchise Tax Board to the complaint be and is sustained without leave to amend on the grounds that the Court has no jurisdiction over the subject of the action and that said complaint fails to state facts sufficient to constitute a cause of action against defendant Franchise Tax Board. (Article XIII, section 32, Constitution of the State of California; Pacific Gas and Electric Co. v. State Bd. of Equalization (1980) 27 Cal.3d 277.)

Dated: November 23, 1984

_____

Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

Department _____

EGON and SONYA LOEBNER,

Plaintiffs,

vs.

FRANCHISE TAX BOARD,

Defendant.

IN OPEN COURT

September 28, 1984

No. 826409

The demurrer of Defendant Franchise Tax Board is sustained without leave to amend for the reasons stated in the demurrer.

Defendant is to prepare the order.

_____

ROY L. WONDER
Judge of the Superior Court

MINUTE ORDER

APPENDIX H

COPY OF NOTICE OF ACTION OF CALIFORNIA FRANCHISE TAX BOARD AFFIRMING PREVIOUS NOTICE OF DEFICIENCY ASSESSMENT (MAILED FEBRUARY 5, 1981)

State of California
FRANCHISE TAX BOARD
Sacramento, California 95867
(800) 852-7050

EGON AND SONYA LOEBNER

2934 Alex Dr
Palo Alto CA 94304

Taxable year 1976
NPA No. 03730250
Dated 05/02/80
Account No. 103243213LOEB
Code 3432400/EY/JL
Date 02/06/81

THE NOTICE REFERRED TO ABOVE HAS BEEN AFFIRMED AS FOLLOWS

ADDITIONAL TAX
INTEREST TO 02/06/81
ADDITIONAL TAX AND INTEREST

ADDITIONAL INTEREST ACCRUES AT A RATE OF $.855 PER DAY FROM THE DATE OF THIS NOTICE.

SEE PAGE 2 FOR EXPLANATORY PARAGRAPHS.

Saul Levin
26521 Aric Ln
Los Altos Hills CA 94022

This Notice of Action constitutes formal action on your protest against the NPA designated above.

If you agree with this Notice of Action, you should pay promptly. Return the blue copy of this notice with payment to the Franchise Tax Board, Sacramento, CA 95867. Payment should include the liability plus interest as shown above.

If you do not agree with this Notice of Action, you may file an appeal with the State Board of Equalization. See reverse side for details.

FORM FTB 5930-M (1-80)

KEEP THIS COPY FOR YOUR RECORDS

WE HAVE RECEIVED YOUR PROTEST DATED MAY 6, 1980 AND UNDERSTAND THE INFORMATION YOU HAVE PRESENTED. HOWEVER, CONSIDERING ALL OF THE FACTS PRESENTED, THE NOTICE OF PROPOSED ASSESSMENT IS CORRECT FOR THE FOLLOWING REASONS.

RESIDENTS WHO LEAVE CALIFORNIA FOR A TEMPORARY OR TRANSITORY STAY ARE HELD TO BE RESIDENTS DURING THEIR ABSENCE AND ARE TAXABLE ON ALL THEIR INCOME.

THE TAXPAYER IS HELD TO BE A "RESIDENT" FOR THE TAXABLE YEAR PURSUANT TO SECTION 17014(B) OF THE REVENUE AND TAXATION CODE. REMITTANCE OF $224 IS BEING APPLIED AS OF JUNE 4, 1980.

APPENDIX I

COPY OF ORDER OF THE CALIFORNIA SUPREME COURT DENYING REVIEW OF CORBETT V. FRANCHISE TAX BOARD AND DECERTIFYING IT FOR PUBLICATION (FILED AUGUST 22, 1985)

ORDER DENYING REVIEW
AFTER JUDGMENET BY THE COURT OF APPEAL
2nd District, Division 3, No. B005216

IN BANK

Corbett et al., Respondents,

v.

FRANCHISE TAX BOARD, Appellant.

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed May 2, 1985, which appears at 167 Cal.App.3d 808. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

Bird, C. J., is of the view the opinion should remain published.

BIRD

Chief Justice

APPENDIX J

COPY OF THE DEPUBLISHED* CORBETT V. FRANCHISE TAX BOARD OPINION OF THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT, DIVISION THREE (FILED MAY 2, 1985)

*Had appeared as 167 Cal.App.3d 808

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GEORGE T. CORBETT, et al.,

Plaintiffs and Respondents,

v.

FRANCHISE TAX BOARD,

Defendant and Appellant.

B005216

(Los Angles County
Sup.Ct. No.)

[167 Cal.App.3d 810]

INTRODUCTION

In this case we are called upon to determine whether respondents are liable as California residents for state income taxes on the whole of their income and whether Code of Civil Procedure section 1060.5 and Revenue and Taxation Code section 19081, under which they sought injunctive and declaratory relief from the tax, are unconstitutional and in conflict with article XIII, section 32, of the California Constitution. We affirm the judgment of the trial court which concluded respondents are not liable for the tax and that the statutes are not unconstitutional.

STATEMENT OF THE CASE

In a complaint filed in Los Angeles Superior Court, plaintiffs and respondents George T. Corbett and Annette Corbett (the Corbetts) sought declaratory

and injunctive relief against defendant and appellant Franchise Tax Board, a subdivision of the State of California (the Board), contending the Board's personal income tax assessments against them for the years 1970,

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1971, 1972 and 1973 were erroneous because they were not residents of California during those years.

Although the Corbetts filed nonresident tax returns for the tax years in question and paid California state income taxes on their income from California sources, the Board asserted the Corbetts should have filed resident tax returns and should have paid California income taxes on the whole of their income. The Board so contended notwithstanding that the Corbetts had filed Illinois resident tax returns and

had paid Illinois resident taxes for those years.

After exhausting their administrative remedies before the Board and the State Board of Equalization, the Corbetts filed an action in the Superior Court for the County of Los Angeles, seeking a judicial determination of nonresidency, in accordance with the procedures set forth in Code of Civil Procedure section 1060.5 and Revenue and Taxation Code section 19081.

HISTORICAL FACTS

The Corbetts and the Board, through their respective counsel, stipulated to the following applicable facts:[1]

The Corbetts were born, raised, married, and raised their own family, in Illinois.

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1. The Corbetts' connections with both California and Illinois during the audit period, as set forth in the stipulated facts, are summarized in appendix A to this opinion.

In 1937, Mr. Corbett began working for George E. Corbett Boiler and Tank, Inc., an Illinois corporation (Corbett Boiler), which had been founded by his grandfather. During the ensuing years he became its president and major shareholder. In 1968 and 1969, he prepared his brother-in-law, Mr. George Quill, to assume the presidency of the company. In 1969, he resigned as president and sold his entire stock interest to Mr. Quill. Concurrently, he assumed the office of vice president, and remained a member of the board of directors. Throughout the audit period of this case, he was consistently an employee of Corbett Boiler. When in Illinois, he inspected job sites, reviewed plans and blueprints, negotiated business and met with new clients. He kept current on boiler technology and attended contractors' association meetings in Illinois.

The Corbetts also were officers and directors of the Corbett Building Corporation, an Illinois corporation (Corbett Building), of which Mr. Corbett was president. They owned 82 percent of the shares of the corporation.

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Corbett Building owned industrial real estate, buildings, and vacant property, all located within the city of Chicago. Its business was the leasing of these properties to industrial concerns, including Corbett Boiler. As officers and directors of Corbett Building, both Mr. and Mrs. Corbett received yearly salaries from the corporation.

Over 95 percent of the Corbetts' income during the audit period was derived from their business interests and activities in Illinois. They had no business nor employment interests of any nature in California.

The Corbetts conduct almost all of their personal banking through the First National Bank of Chicago. All securities owned by the Corbetts are maintained in an agency account at that bank and are physically located there. They collect and deposit their income in Illinois. They had a small savings account and a checking account in Santa Barbara for small expenses and emergencies. The income from these California bank accounts was less than $300 per year.

The Corbetts' wills were prepared in Chicago; the wills, which are physically present there, recite the city of Chicago and the State of Illinois as the Corbetts' place of residence.

The Corbetts filed Illinois state resident income tax returns and paid the illinois income tax applicable to Illinois residents. They filed

California nonresident income tax returns and paid the California income tax applicable to nonresidents. Their Illinois address is shown as their permanent address on all of their state and federal tax returns. The tax returns are prepared in Illinois.

The Corbetts own and maintain a custom home in Chicago which they built more than 25 years ago. Their cemetery lots, voter registrations, family doctors, dentists, professional advisors, lawyers, bankers and accountants are all in Illinois.

The only real property interest the Corbetts have in California is a house in Santa Barbara, which they purchased in 1969 to provide accommodations during their visits to this state.

During the years in question, the Corbetts owned one car registered in Illinois and one which was registered in

California. They both had Illinois driver's licenses. Mrs. Corbett also had a California driver's license for a portion of the audit period.

The Corbetts attended church services wherever they were in the world. They were members of and made donations to a church in Illinois. They

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made donations to a church they attended in Santa Barbara, although they were not members.

The Corbetts had many friends and family members in Illinois. In 1973 they celebrated their 25th wedding anniversary in Chicago with a party for over 150 guests. They also attended a number of other social events in the Chicago area.

The Corbetts joined the Montecito Country Club of Santa Barbara and frequently played golf there. Their

other social activities in California consisted of visits with California relatives and attendance at occasional church functions. They enjoyed spending the winter season in sunny California and visiting their California relatives. For those reasons they stayed in California for lengthy periods during the audit years.

During the summer of 1972, while Mrs. Corbett was in California, she suffered a sudden and severe gall bladder attack. She was unable to return to Illinois for treatment by her regular physician. The operation caused her to remain in California for all of that summer and to curtail her travels in late 1972 and early 1973.

In each of the questioned years, the Corbetts spent less than nine months in California, ranging from six and one-half months in 1971 to eight and one-

half months in 1973. When not present in California, they were generally at their house in Chicago.

ISSUES

1. Whether Code of Civil Procedures section 1060.5 and Revenue and Taxation Code section 19081, under which the Corbetts brought their action for declaratory and injunctive relief from California income tax assessments, are in conflict with article XIII, section 32, of the California Constitution.

2. Whether the Corbetts were residents of California during the audit years for purposes of the California Personal Income Tax Law.

DISCUSSION

Code of Civil Procedure section 1060.5 and Revenue and Taxation Code section 19081 are constitutional.

Appellant contends Code of Civil Procedure section 1060.5 and Revenue and

Taxation Code section 19081 are unconstitutional in that they violate article XIII, section 32, of the California constitution.

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Section 32 provides: "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

Section 1060.5 of the Code of Civil Procedure, enacted in 1955 (Stats. 1955, ch. 1555, § 1, p. 2834), forms part of the declaratory relief act (Code Civ. Proc., §§ 1060-1062.5). Section 1060.5 permits any person claiming nonresidence, for purposes of the Personal Income Tax

Law (Rev. & Tax. Code, § 17001 et seq.), to obtain a declaratory judgment regarding the fact of his or her residence by following the procedure set forth in Revenue and Tax Code section 19081.[2]

The declaratory relief act was passed in 1921 (Stats. 1921, ch. 643, § 1, p. 689). It was one of the first of its kind to appear in the United States. (See Harrison, California Legislation of 1921 Providing for Declaratory Relief (1921) 9 Cal.L.Rev. 359.) In 1923, a unanimous California

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2. California Code of Civil Procedure section 1060.5 provides: "Any individual claiming to be a nonresident of the State of California for the purposes of the Personal Income Tax Law may commence any action in the Superior Court in the County of Sacramento, or in the County of Los Angeles, or in the City and County of San Francisco, against the Franchise Tax Board to determine the fact of his residence in this State under the conditions and circumstances set forth in Section 19081 of the Revenue and Taxation Code."

Supreme Court held the act constitutional. (Blakeslee v. Wilson (1923) 190 Cal.2d 479 [132 P. 495]. In 1942, in Hoyt v. Board of Civil Service Commrs. (1942) 21 Cal.2d 399 [132 P.2d 804], the Supreme Court held that section 1060 authorized declaratory relief against state action. The court held that, where no impairment of sovereignty would result, and where no special statute precluded suit against the sovereign, it would be presumed that the Legislature intended the section to apply to governmental action. (Id., at p. 403, see pp. 400-405.)

However, special statutes did preclude the use of declaratory judgments in tax disputes between individuals and the government. (See Casey v. Bonelli (1949) 93 Cal.App.2d 253 [208 P.2d 723]; Lewis Eckert B. Co. v. Unemploy R. Com. (1941) 47 Cal.App.2d 844 [119 P.2d

227].) These special statutes were those that implemented[3] article XIII, section 32, of the California Constitution[4] and, in general, mirrored the working of a paragraph in former section 15, of article XIII,[5] the immediate predecessor of section 32. (See, e.g.,

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3. Section 33 of article XIII of the California Constitution (formerly 13) declares: "The Legislature shall pass all laws necessary to carry out the provisions of this article."

4. There have been similar constitutional provisions which have been subject to numerous minor revisions and renumberings since 1910. In 1974, this provision was placed in separate section 32 and amended to its present form. (See Pacific Gas & Electric Co. v. State Bd. of Equalization (1980) 27 Cal.3d 277, 280, fn. 3, 281, fn. 5 [165 Cal.Rtpr. 122, 611 P.2d 463].)

5. Former section 15 of article XIII of the California Constitution read, in part: "No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof an action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected."

Rev. & Tax. Code, 6931 [re sales and use taxes], 8146 [re motor vehicle fuel tax], 9171 [re use fuel tax], 11571 [54 private car tax], 13101 [re insurance tax], 16123 [re gift tax], 26101 [re bank and corporation taxes], 32411 [re alcoholic beverage tax].)

Prior to its amendment in 1955 (Stats. 1955, ch. 1707, § 1, p. 3141), when section 1060.5 was added to the Code of Civil Procedure, section 19081 provided: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of this State to prevent or enjoin the assessment or collection of any tax under this part."

As amended in 1955, section 1955, section 19081 retained its original provisions, as quoted above, but added

the provision that persons protesting a deficiency assessment, issued because of his or her alleged residence in this state, may bring court action against the Franchise Tax Board (after appealing from the Board to the State Board of Equalization) to determine the fact of residency, and that no tax based solely on residency shall be collected from such persons for 60 days after the action of the State Board of Equalization becomes final or during pendency of a court action.[6] (See

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6. Since its amendment in 1955, California Revenue and Taxation Code section 19081, has provided: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of this State to prevent or enjoin the assessment or collection of any tax under this part; provided, however, that any individual after protesting a notice or notices of deficiency assessment issued because of his alleged residence in this State and after appealing from the action of the Franchise Tax Board to the State Board of Equalization, may within 60 days after the action of the State Board of Equalization becomes final commence an action,

Review of 1955 Legislation (Cont. Ed. Bar) pp. 126-126.)

It is this 1955 amendment to Revenue and Taxation Code section 19081, and Code of Civil Procedure section 1060.5, enacted in 1955, which the

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Board urges conflict with article XIII, section 32, of the California Constitution and violate the principle derived therefrom, namely, that an action for a tax refund is the exclusive means of

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on the grounds set forth in his protest, in the Superior Court of the County of Sacramento, in the County of Los Angeles or in the City and County of San Francisco against the Franchise Tax Board to determine the fact of his residence in this State during the year or years set forth in the notice or notices of deficiency assessment. No tax under this part based solely upon the residence of such an individual shall be collected from such individual until 60 days after the action of the State Board of Equalization becomes final and, if he commences an action pursuant to this section, during the pendency of such action, other than by way of or under the jeopardy assessment provisions of this part."

obtaining judicial review of state tax assessments.[7]

The Board argues that whenever statutes conflict with constitutional provisions, the latter must prevail (People v. Navarro (1972) 7 Cal.3d 248, 260 [102 Cal.Rptr. 137, 497 P.2d 481]), that legislative mandates cannot take precedence over constitutional provisions (Molar v. Gates (1979) 98 Cal.App.3d 1, 24 [159 Cal.Rptr. 239, 12

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7. The cases cited by the Board for those propositions are readily distinguishable, because in none of the cases cited was the taxpayer challenging a personal income tax deficiency assessment on residency grounds. (See Pacific Gas & Electric Co. v. State Bd. of Equalization, supra, 27 Cal.3d 277, 279 [re adjustment of real property assessment pursuant to art. XIII A of the Cal. Const., popularly known as Prop. 13]; United States Steel Corp. v. Franchise Tax Board (1983) 144 Cal.App.3d 473, 481 [192 Cal.Rtpr. 677] [re bank and corporation taxes]; Hunter-Reay v. Franchise Tax Board (1983) 140 Cal.App.3d 875, 881 [189 Cal.Rptr. 801] [re personal income tax; assessment not protested on residency grounds]; Horack v. Franchise Tax Board (1971) 18 Cal.App.3d 363, 370 [95 Cal.Rptr. 717] [re personal income tax; a jeopardy assessment, not protested on residency grounds].)

A.L.R.4th 1197]) and that the Legislature may not exercise any power that is expressly or impliedly forbidden to it by the state Constitution (Wood v. Hamaguchi (1929) 207 Cal. 79, 90 [277 P. 113, 63 A.L.R. 861]).

While the Board's arguments are not wrong as far as they go, in Dupuy v. Superior Court (1975) 15 Cal.3d 410 [124 Cal.Rptr. 900, 541 P.2d 540], our Supreme Court held that "the anti-injunction provision of the California Constitution [Cal. Const., art. XIII, § 32] must yield to the paramount provisions of the United States Constitution (Cal. Const., art. III, §1) . . . ." (Id., at p. 418.)

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due

process of law."[8] (Italics added.)

The legal sage Bernard E. Witkin authoritatively advises: "In its origin, the meaning of the term 'due process' was procedural. The protection was against judicial or administrative procedure which, by reason of denial of notice and opportunity for a hearing, unfairly deprived a person or property or personal rights. . . . But in its development in the United States the due process clause has been interpreted as a limitation upon the legislative as well as the judicial and executive branches of the government, thus pre-

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venting arbitrary and unreasonable legislation. This aspect of the subject is known as substantive due process to

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8. The California Constitution also contains a due process clause (Cal. Const., art. I, § 7, subd.(a)).

distinguish it from procedural due process." (5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 279, pp. 3569-3570, original italics.)

Substantive due process is best illustrated by cases dealing with the police power, but substantive due process also restricts other governmental powers, such as the power of eminent domain and the power to tax. (Id., at p. 3570.)

The taxing power of a state, while basic to its sovereignty, is subject to substantive due process limitations, which include those relating to its territorial jurisdictions. (5 Witkin, Summary, of Cal. Law., supra, Taxation, 2, pp. 3988-3989; see also Sabine, Constitutional and Statutory Limits on the Power to Tax (1960) 12 Hastings L.J. 23, 30-40.) Some of these jurisdictional (substantive due process) aspects of state power were summarized in Miller

Bros. Co. v. Maryland (1954) 347 U.S. 340 [98 L.Ed. 744, 74 S.Ct. 535],[9] in which the United States Supreme Court held a Maryland use tax against a Delaware seller was void as extraterritorial. The court noted its holding was mandated by

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9. The United States Supreme Court in Miller Bros. Co. v. Maryland, supra, 347 U.S. 340, stated in regard to a state's power to tax consistent with the requirements of substantive due process: "[T]he Court has frequently held that a domicile or residence, more substantial than mere presence in transit or sojourn, is an adequate basis for taxation, including income, property,and death taxes. Since the Fourteenth Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally recognized reciprocal duties of protection by the state and of allegiance and support by the citizen. The latter obviously includes a duty to pay taxes, and their nature and measure is largely a political matter. Of course, the situs of property may tax it regardless of the citizenship, domicile or residence of the owner, the most obvious illustration being a tax on realty laid by the state in which the realty is located. Also, the keeping of tangible or intangible personality within a state may give it a similar taxable situs there (sometimes called a business or commercial situs or domicile). Certain activities or transactions carried on within a state, such as the use and sale of property may give jurisdiction to tax whomsoever engages therein, and the use of highways may subject the use to certain types of taxation. These cases overlap with those in which incorporation by

its theretofore consistent adherence to the time-honored concept: "[T]hat due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (347 U.S. 340, 344-345 [98 L.Ed.2d 744, 748]; see 5 Witkin, Summary of Cal. Law, supra, Taxation, 2, p. 3989.)

Thus, "[a] state may constitutionally tax the income of its residents whenever earned as well as the income of non-residents derived from sources

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within the state." (Davis v. Franchise

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a state or permission to do business there forms the basis for proportionate taxation of a company, including its franchise, capital, income and property. Recent cases in which a taxable sale does not clearly take place within the taxing state, elements of the transaction occurring in different states, have presented peculiar difficulties, as have those where the party is liable for a use tax does not use the product within the taxing state." (At p. 345 [98 L.Ed. at pp. 748-749], fns. omitted.)

Tax Board (1977) 71 Cal.App.3d 998, 1002 [139 Cal.Rptr. 797]; see N.H. ex rel. Cohn v. Graves (1937) 300 U.S. 308, 313 [81 L.Ed. 666, 670, 57, S.Ct. 466, 108 A.L.R. 721]; Lawrence v. State Tax Comm. (1932) 286 U.S. 276, 280-281 [76 L.Ed. 1102, 1105-1106, 52 S.Ct. 556, 87 A.L.R. 374]; Shaffer v. Carter (1920) 252 U.S.37, 52-53 [64 L.Ed. 445, 456-457, 40 S.Ct. 221]; Travel v. Yale & Towne Mgf. Co. (1920) 252 U.D. 60, 75-76 [64 L.Ed. 460, 468, 40 S.Ct. 228].) In short, a state is without power to impose an income tax unless it has jurisdiction of the person taxed or of the property or business which produced the income taxed. (Shaffer v. Carter, supra, 252 U.D.37, 52 [64 L.Ed.2d 445, 456], 85 C.J.S., Taxation, 1090, p. 701.)

In Travis v. Yale & Towne Mfg. Co., supra, 252 U.S. 60, the United States Supreme Court explained this limitation

on the taxing power of the states thusly: "A statute imposing a personal tax on persons over whom the State has no jurisdiction conflicts with the Fourteenth Amendment and is a taking of property without due process of law. . . . If the State has not jurisdiction to impose a personal liability for tax on a non-resident, it is immaterial whether that non-resident is engaging in an occupation in the State from which he derives a large income or not. So, also if the State has the jurisdiction to impose a tax, it is immaterial whether the non-resident's occupation in the State is gainful in money or in health or in pleasure. The State either has or has not the jurisdiction to impose a personal liability against a non-resident for the payment of taxes." (At p. 68.)

The United States Supreme Court early held that "[w]here there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition." (St. Louis v. The Ferry Company (1870) 78 U.S. (11 Wall.) 423, 430 [20 L.Ed. 192, 194], original italics and italics added; 71 Am.Jur.2d State and Local Taxation, § 85, p. 409).

Clearly, in 1955, when the Legislature amended Revenue and Taxation Code section 19081 and enacted Code of Civil

Procedure section 1960.5--to allow a prepayment court action for persons protesting an income tax assessment on residency grounds--it intended thereby to safeguard the substantive due process rights of nonresidents. The Legisla-

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ture apparently recognized that such claim of nonresidency is a challenge to the very jurisdiction of the state to impose a personal income tax.[10]

(4) In California Housing Finance Agency v. Elliott (1976) 17 Cal.3d 575 [131 Cal.Rptr. 361, 551 P.2d 1193], the

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10. Both the United States and California Supreme Courts have held that procedural due process does not require judicial determination of tax liability before collection (Phillips v. Commissioner (1931) 283 U.S. 589, 597-599 [75 L.Ed. 1289, 1297-1298, 51 S.Ct. 608]; Dupuy v. Superior Court, supra, 15 Cal.3d 410, 416) nor preclude the government from effecting the collection of taxes by summary administrative proceedings (Phillips v. Commissioner, supra, at p. 595 [75 L.Ed. at p. 1296]; Dupuy v. Superior Court, supra, 15 Cal.3d at p. 416).

California Supreme Court restated a well settled principle: "In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act." (Id., at p. 594.)

(1c) In view of this presumption of statutory validity and the California Supreme Court's determination in Dupuy v. Superior Court, supra, 15 Cal.3d 410, 418, that the anti-injunction provision of the California Constitution (Cal. Const., art. XIII, § 32) must yield to the paramount provisions of the United States Constitution (Cal. Const., art. III, § 1), we hold that Revenue and Tax Code section 19081 and Code of Civil Procedure section 1060.5, are

constitutional under both the state and federal Constitutions.

II.

The Corbetts were not residents of California during the audit period.

The Board contends the trial court erred in finding the Corbetts were not residents of California during the audit period, the years 1970, 1971, 1972 and 1973.

Since the issue presented here involves the applicability of a statute to stipulated and uncontradicted facts, we are confronted with a pure question of law and are not bound by the findings of the trial court. (Klemp v. Franchise Tax Bd. (1975) 45 Cal.App.3d 870, 872 [119 Cal.Rptr. 821]; Whittell v. Franchise Tax Board (1964) 231 Cal.App.2d 278, 283 [41 Cal.Rptr. 673].)

In making our determination on the residency question, we are guided by

this court's decision in Klemp v. Franchise Tax Bd., supra, 45 Cal.App.3d 870. Klemp is significant because it is the only decision by a California

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court to delineate the basic residency requirements for liability under the Personal Income Tax Law. (See Comment (1975) 16 Santa Clara L.Rev. 176, 181.) It is also the only case to determine whether persons from another state have acquired a residency in California. (Id., at p. 181, fn. 34.)[11]

We therefore set forth the pertinent statutes in effect during the years in

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11. Whittell v. Franchise Tax Board, supra, 231 Cal.App.2d 278, was based on fact quite different from Klemp and this case. In Whittell the question was whether Californians had given up their California residence when they moved their domicile to Nevada. The question in Klemp and the instant case is whether persons from another state have acquired a residence in California. (See Klemp v. Franchise Tax Bd., supra, 45 Cal.App.3d at p. 875; and see Comment, supra, 16 Santa Clara L.Rev. at p. 181, fn. 34.)

question as did the Klemp court (at pp. 874-875), so that we may analyze the facts of this case in light of the governing law.

The relevant Revenue and Taxation Code provisions are as follows:[12]

Section 17014 imposes a tax "upon the entire taxable income of every resident of this state. . . ."

Section 17014 provides that "'Resident' includes:

"(a) Every individual who is in this State for other than a temporary or transitory purpose.

"(b) Every individual domiciled in this State who is outside the State for a temporary or transitory purpose.

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12. The quoted provisions of the Revenue and Taxation Code are those which were in effect during the audit years. The sections have since been renumbered, and otherwise changed, but the quoted provisions remain identical.

"Any individual who is a resident of this State continues to be a resident even though temporarily absent from the State."

Section 17015 provides that "'Nonresident' means every individual other than a resident."

Section 17016 raises a rebuttable presumption of residence: "Every individual who spends in the aggregate more than nine months of the taxable year within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that the individual is in the State for a temporary or transitory purpose."

The issue here, as in the Klemp case, is whether during the audit years the Corbetts were in California "for other than a temporary, or transitory

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purpose" within the meaning of section

17014, which defines the meaning of "'Resident.'"

Our inquiry, therefore, is aided by an examination of the Board's own regulations, issued pursuant to Revenue and Taxation Code 19253, which interpret the statutory definition of residence. Included in these regulations are the following: "Whether or not the purpose for which an individual in this State will be considered temporary or transitory in character will depend to a large extent upon the facts and circumstances of each particular case. . . .

"The underlying theory of Sections 17014-1706 is that the state with which a person has the closest connection during the taxable year is the state of his residence.

"An individual whose presence in California does not exceed an aggregate of six months within the taxable year and

who is domiciled without the state and maintains a permanent abode at the place of his domicile, will be considered as being in this state for temporary or transitory purposes providing he does not engage in any activity or conduct within this State other than that of a seasonal visitor, tourist or guest.

"An individual may be a seasonal visitor, tourist or guest even though he owns or maintains an abode in California or has a bank account here for the purpose of paying personal expenses or joins local social clubs." (Cal.Admin. Code, tit. 18, regs. 17014-17016(b).)[13]

In the instant case, as in Klemp, the Board does not contend the Corbetts

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13. Regulations 17014-17016(b) of title 18 of the California Administrative Code was in effect during the audit years. The section has since been renumbered to Section 127014, but the quoted portions are identical in the present version of the regulation.

are individuals "dom[illegible]iled in this State" under section 17014. Impliedly they thus concede the Corbetts are domiciliaries of Illinois. Rather, the Board's argument emphasizes the comparison between the amount of time the Corbetts spent in California versus the time they spent in Illinois during the audit years.

Preliminarily, we note that since the Corbetts never spent nine or more months in California, they fall outside the statutory presumption of residence based on physical presence. (Rev. & Tax. Code, § 17016.) Section 17016 establishes that the length of time a person is in California does not necessarily compel a determination that he or she has acquired residence here. (Klemp v. Franchise Tax Bd., supra, 45 Cal.App.3d at p. 876.) The

section "concedes that evidence may show that presence for more than nine months is 'for a temporary or transitory purpose,' and, hence, does not constitute residence for income tax purposes." (Ibid.)

The regulations recognize that a person who stays in California as long as six months, who is domiciled without the state and who maintains a permanent abode at the place of domicile, may be considered as being in this state for temporary or transitory purposes "'providing he does not engage in any activity or conduct within this State other than that of a seasonal visitor, tourist or guest.'" (Ibid.) During the time in question, the Corbetts did Corbetts did not engage in any activity or conduct in California other than that of a seasonal visitor or tourist. The regulations

establish that the ownership of an abode, a bank account and a social club membership in this state do not subject a seasonal visitor to California income tax. (Id., at pp. 876-877.) That the Corbetts spent more than six months in California during some of the audit years is only a factor to be considered as an indication of the purpose of the visit, and should not "tip the scale" when all other circumstances point clearly to residency being in Illinois. (See, id., at p. 877.)

In comparing the facts of this case with those in Klemp, we note that the Corbetts spent almost nine months in California during some of the years in question, while the Klemps spent at most only six months of a questioned year in this state. However, unlike the Klemps, who rented a motel apartment in Chicago which they relinquished when they were

not in that city, the Corbetts maintained a permanent residence in their native Illinois, a factor which mitigates in favor of a finding they were seasonal visitors to California. (See 45 Cal.App.3d at p. 877.)

Otherwise the facts of the two cases are very similar. Both the Corbetts and the Klemps had prospered to the point where they were free to leave Illinois, returning only when their respective businesses needed them. The couples continued to manage substantial business interests in Illinois during their absences from that state, but none of those interests were transferred from Illinois to California. Both the Klemps and the Corbetts preserved in Illinois the many relationships and interests they had built over a lifetime.

The Klemps' only connection with California was their purpose to spend the

colder half of the year as visitors in the California desert, together with their ownership of a house and a club affiliation suitable for that purpose. (45 Cal.App.3d at p. 877.) The Corbetts' connection with California was almost identical to that of the Klemps, except that another purpose of the Corbetts' stays in California was a desire to be with their California relatives.

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The standards established by the statutes, the regulations and the Klemp case, require a finding that the state with which the Corbetts' had the "'closest connection during the taxable year[s]'" in question was their native Illinois, notwithstanding their lengthy stays in California. (45 Cal.App.3d at p. 876.) We hold, therefore, that the Corbetts remained Illinois residents

during those years and did not become California residents within the meaning of section 17014.

CONCLUSION

Substantive due process, in the development of our American jurisprudence, has been a bulwark in the series of safeguards created to curb and curtail governmental power in its dealings with the individual. Its historical roots stem from the struggle against the arbitrary and compulsive coercion of kings and their representatives. Its modern application is to protect the citizenry against the potentially overwhelming power, prestige and resources of the state. Its present role, as chronicled here, is as guardian of the People against improper confiscation of private property.

DISPOSITION

The judgment is affirmed.

Arabian, J.

Lui, J., concurred

KLEIN, P. J.--I concur in the result. This case deals with the power of the Franchise Tax Board to tax respondents as residents of California when they claim they are residents of Illinois. The issue thus presented is whether the state has jurisdiction to assess a tax against respondents without respondents' having the opportunity to challenge the state's claim of jurisdiction to impose a tax in the first instance.

To reiterate, the California Constitution, article XIII, section 32, provides "[n]o legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of

a tax claimed to be illegal, an action may be maintained to recover the tax paid, . . ." Pacific Gas & Electric Co. v. State Bd. of Equalization (1980) 27 Cal.3d 277 [65 Cal.Rptr. 122, 611 P.2d 463] upheld the application of section 32, article XIII, of the California Constitution in a fact situation not involving a question, as here, of jurisdiction of the state over the purported taxpayers.

Because of the limited application of Revenue and Taxation Code, section 19081 to persons claiming nonresidency status, I acquiesce in the majority view that the section is constitutional.

[167 Cal.App.3d 824]

APPENDIX A*

Nature of Connection	State of Closest Connection
Birth, marriage, raising family	Illinois
Preparation of tax returns	Illinois

Resident state income tax returns filed	Illinois
Payment and receipt of over 95% of income	Illinois
Own and occupy custom built home	Illinois
Serve as officer and employee of business corporation	Illinois
Hold license for conduct of profession	Illinois
Ownership of family corporation	Illinois
Own and occupy vacation home	California
Ownership of cemetery lots	Illinois
Church attendance	California & Illinois
Church donations	California & Illinois
Church membership and committee participation	Illinois
Family doctors and dentists	Illinois
Car registration	California & Illinois
Driver['s] license (Mr. Corbett)	Illinois
Driver['s] license (Mrs. Corbett)	California & Illinois
Registered to vote and voted	Illinois
Charge accounts	California & Illinois
Predominant banking and financial accounts	Illinois
Accountants, lawyers & professional advisors	Illinois
Wills prepared and located	Illinois
Education of child	Illinois
Most days within state	California
Country club membership	California
Plaintiffs intended state of residence	Illinois
Family members present and visited	California & Illinois
Social event attendance	Illinois
Professional membership	Illinois

Of the above listed twenty-nine (29) "connections" (compiled by extracting the facts in summary fashion from the filed Stipulations thereof in the same order presented therein) twenty (20) show a connection only with Illinois; three (3) show a connection only with California; and four (4) show some connection with both states.

*Exhibit A in the trial court.

APPENDIX K

COPY OF CALIFORNIA SUPREME COURT'S DENIAL OF TWO LETTER REQUESTS OF AUGUST 4 AND 15, 1986 TO PUBLISH IN PART THE CORBETT. V. FRANCHISE TAX BOARD OPINION (FILED NOVEMBER 19, 1986)

NO. 2/3 B005216

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

CORBETT ET AL.

V.

FRANCHISE TAX BOARD

The request for an order directing partial publication of the opinion in the above-entitled cause is DENIED.

BIRD

Chief Justice

APPENDIX L

COPY OF CALIFORNIA SUPREME COURT'S DENIAL OF AN APRIL 29, 1988 REQUEST TO PUBLISH IN PART THE CORBETT V. FRANCHISE TAX BOARD OPINION (FILED MAY 25, 1988)

NO. 1/4 B005216, 5005447

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

CORBETT ET AL., Respondents,

v.

FRANCHISE TAX BOARD, Appellant.

The request for an order directing partial publication of the opinion in the above-entitled cause is DENIED.

Lucas

Chief Justice

APPENDIX M

PRESIDENTIAL APPOINTMENT OF EGON E. LOEBNER TO DIPLOMATIC SERVICE

The President of the United States
of America

To Egon E. Loebner

a Foreign Service Reserve Officer of the United States of America. Greeting:

Reposing special trust and confidence in your Integrity, Prudence, and Ability, I have nominated and by and with the advice and consent of the Senate, do appoint you a Consular Officer and a Secretary in the Diplomatic Service of the United States of America and do authorize and empower you to have and to hold said office, and to exercise and enjoy all the rights, privileges, and immunities thereunto appertaining, during the pleasure of the President of the United States.

In testimony thereof I have caused the Seal of the United States to be hereunto affixed.

Done at the City of Washington this fifteenth day of March, in the year of

our Lord one thousand nine hundred and seventy-five, and of the Independence of the United States of America the one hundred and ninety ninth.

By the President: Gerald R. Ford

[signature]

Henry A. Kissinger [signature]
Secretary of State

Seal

APPENDIX N

EXCERPT FROM REPORTER'S TRANSCRIPT OF PROCEEDINGS BEFORE HON. L. WOUDES, JUDGE, DEPARTMENT 8, THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO ON FRIDAY, SEPTEMBER 28, 1984

Appearances:

For the Plaintiff: Mr. Egon E. Loebner
In Propria Persona

For the Defendant: Patricia Streloff
Deputy Attorney General

RT at 1

MS. STRELOFF: What is it that has raisd a question in your mind?

THE COURT: The provision in the code that says no tax will be collected for 60 days until after the State Board determines

RT at 2

residency;and if there is to be any litigation, that the collection will not be made until after the completion of that litigation. 19081. And that, of course, conflicts with the state constitution, Article XIII, Section 32, which would provide that in order to recover taxes that they first be paid.

MS. STRELOFF: Of course, that's our argument that the statute is unconstitutional.

THE COURT: I understand that. Mr. Loebner would prefer that I follow the statute with which your organization is

intimately familiar and assists in the drafting from inception through regulations and its administration.

Have you focused on this conflict before?

MS. STRELOFF: No, your honor.